# Petition

81-266

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No. A-979

IN THE

# Supreme Court of the United States

October Term, 1981

JOHN H. BRADLEY.

*Petitioner.*

vs.

COMPUTER SCIENCES CORPORATION, INC. *et al.*,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

JOHN H. BRADLEY

*Petitioner, pro se*

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August 10, 1981

## QUESTIONS PRESENTED

1. Was doctrine of collateral estoppel correctly applied to prohibit evidence available from petitioner's administrative dismissal hearing from being presented in district court tort/conspiracy action, where the administrative hearing examiner had no jurisdictional authority to resolve torts, to provide relief in petitioner's federal civil conspiracy cause of action, or to provide petitioner a jury trial?

2. Can the shield of qualified immunity and immunity be granted by directed verdict to defendant corporation and federal supervisor who was stockholder at all material times in the corporate contractor, and where the cause of action was for civil rights conspiracy between the two defendants?*

*The complete list of defendants is: Computer Sciences Corporation, Inc., James S. Ketler, Herbert C. Hollander, Irving Bialick and Marsden E. Champaign.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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Petitioner, John Bradley, acting pro se, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 13, 1981.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is a published opinion, cited as 643 F.2d 1029 (1981).

## JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. 1254 for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit appeal was decided on March 13, 1981. Upon request of

petitioner, and Order Extending Time To File Petition For Writ Of Certiorari was granted on May 29, 1981, to August 10, 1981.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fifth Amendments to the United States Constitution, United States Code, Title 5, Section 4304(b) and Title 42, Section 1985 are set forth in the Appendix as Exhibit E.

## STATEMENT OF THE CASE

Petitioner Bradley was dismissed from his job in the Federal Service for making comments critical of a Government contractor. The federal supervisor who dismissed him held substantial stockholdings in the same contractor. This financial interest was undisclosed and unlawful. Petitioner brought an administrative appeal to clear his name, and this suit for damages.

The district court dismissed petitioner's case, relying on the adverse outcome of the administrative proceeding. The administrative action was later reopened for a new adjudication, but the Fourth Circuit denied petitioner's request for remand thereby precluding petitioner from having his case heard on the merits.

Petitioner is a World War II veteran, honorably discharged from the U.S. Submarine Service with Good Conduct Medal. At all material times in this case, petitioner was a senior computer systems engineer with the Department of Defense. In May 1972, petitioner was assigned on a promotional transfer to the Defense Communications Agency, primarily in recognition of a long experience record, highest possible supervisory ratings for cooperation with management, (Plaintiff's Exhibit 16; Tr. 53) and two books he had written, one of which had been selected a year earlier by the Book-of-the-Month Club in the computer field. (Pl. Ex. 2, 3). On July 1, 1977, petitioner was permanently removed from federal employment, "for the good of the service".

Immediately upon transfer to the DoD agency, petitioner was assigned to a new project involving computer network support for the President of the United States. The project was just getting underway in that agency. The ultimate objective of the project was to link defense computers at sites scattered widely overseas and in the U.S. in such a manner that they could converse with each other during preliminaries to a nuclear attack upon the United States. There was no part of the Triad defense configuration which did not in some way depend on this network. The public welfare was broadly and decisively at stake.

On December 2, 1971, the Deputy Secretary of Defense promulgated mandatory operational objectives for the Presidential network.[1] Three such objectives were cited as top priorities, one of which was reliability, that is, the ability of the computer network to function properly when needed.

Despite this top management edict, defendant Marsden Champaign wrote secretly to petitioner's supervisor on Nov. 21, 1973 recommending his removal from the entire project because he had "repeatedly stressed that component reliability was a key factor in the tests" during a rehearsal briefing planned for top management in the Joint Chiefs of Staff. (Pl. Ex. 54). Champaign wrote a second secret ("Eyes Only") memorandum on May 5, 1974, long after the formal briefing had been given, stating again that reliability was "of secondary importance", and again recommending petitioner's removal from the project because of his expressions of support during the rehearsal briefing for engineering reliability into the defense computer network. (Pl. Ex. 60) In his second memorandum, Champaign had bolstered his false claim that reliability was of secondary importance by a second false claim that the development network was never intended to become operational. Official minutes of the formal briefing, however, show that both Champaign and his subordinates conceded to top management that they were supporting the current management plan for the network to

[1] Formally titled, the World-Wide Military Command and Control System (WWMCCS).

become operational. The network did, in fact, become operational on July 18, 1977, less than three weeks after petitioner's dismissal from his job. Champaign's two memoranda were conspicuously false, and as the initial lead supervisor for the computer network project, he knew or should have known that they were false.

Although both of Champaign's memoranda contained extremely hostile and personal attacks upon petitioner, they failed to accomplish their purpose of persuading petitioner's supervisor to remove him from the project. In September 1974, the supervisor left the agency, and Champaign arranged for petitioner to be transferred under his supervision. Pl. Ex. 68. This action was in direct conflict with standing agency policy and regulation which specifically stressed the importance of the supervisor-supervisee relationship to the success of the agency mission:

> "DCA will conduct its relationship, with its civilian employees in accordance with the enclosed DoD Directive with recognition of the fact that the key to how effectively the DCA mission is accomplished lies in the relationship between the supervisor and each person he supervises."

DCA Instruction 220-50-32, Statement of Personnel Policy for Civilian Personnel, March 4, 1970.

Petitioner vigorously protested the transfer, in writing, via the federal grievance procedure to no avail. Petitioner's grievance was rejected at the outset, in blatant violation of statute, 5 C.F.R. 771.

After petitioner's transfer under supervisor Champaign, petitioner's attempts to do the job he had been specifically hired to do were constantly impeded. Petitioner was unofficially stripped of his engineering duties, assigned to clerical tasks, (Pl. Ex. 110) denied normal access to job-related meetings (Tr. 87) and generally kept out of the main stream of the project. Personal harrassment was the order of the day. The record shows that

petitioner's attempts to obtain outside employment were equally frustrated by Covert actions on the part of Champaign and his subordinate supervisor, Irving Bialick.

Left with no job satisfaction, and a deep sense of imminent personal disaster, petitioner worked determinedly to obtain two successive annual Satisfactory Performance Ratings, logging long hours of overtime, without recognition. The Champaign/Bialick conspiracy dragged on.

On March 3, 1976, a private contractor, Computer Sciences Corporation, in which defendant Bialick held stock, joined the conspiracy. A letter of complaint was coordinated between supervisor Bialick and corporate executive Herbet Hollander charging petitioner with "misrepresentation" in the matter of a task with which petitioner and the corporation had been jointly involved. (Pl. Ex. 259) The joint venture had been arranged by Bialick. Defendant Hollander testified under oath (Dep. 39) that he had contacted Bialick by telephone, read the defaming letter in full to him, and then asked Bialick if he had any "second thoughts". At that point, the record shows that stockholder Bialick gave the go-ahead for the corporate executive to send it in to the federal agency. (Dep. 39) Later, the record also shows that defendant Hollander contradicted his own testimony and denied the damaging implications. (Tr. 395-401)

Unkown to petitioner at the time, supervisor Bialick had entered employment with the federal government while in possession of Computer Sciences Corporation stockholdings, and had retained such financial interests in excess of 1700 shares (est. $29,000) during the period he was responsible for supervision of the contractor's performance. Since the federal contract explicitly obligated Computer Sciences Corp. to attend the computer network reliability problem, both the corporation and stockholder Bialick had more than a passing interest in minimizing any failure to correct the problem. Petitioner Bradley, the reliability engineering specialist, was thus cast in a de facto "adversary" relationship with his supervisor by the

stockholdings which that supervisor retained in the Computer Sciences Corporation.

The law explicitly prohibited such a conflict of interests. [18 U.S.C. 201(g), 203(a), 208, and its progeny]. Case precedent was equally clear in its prohibition of such stock ownership by a federal official. A 1978 ruling by the Texas appellate court in *United States v. Evans,* held that under the conflict of interest statutes, the gravamen of each offense was not intent to be corrupted or influenced but simply acceptance of unauthorized compensation. 572 F.2d 455. Supervisor Bialick had made a tidy profit on the sale of his stockholdings of $4000.00. Even Department of Defense directives carried the explicit prohibition against conflict of interest stockholdings such as that finally admitted by supervisor Bialick.[2] DoD Directive 5500.7, August 8, 1967, as amended. In the case at bar, defendant Bialick was acting at all material times outside of the scope of his authority in his illicit association with the co-defendant corporation and its employees.

In the meantime, the reliability threat was becoming even more difficult to minimize. Field commanders who participated in the multi-national exercises of the prototype network complained vocally and in writing. Even within the agency itself, management began to realize that the reliability problem had become a threat to the success of the project. The warning alert first sounded by engineer Bradley in November 1973 at the rehearsal briefing had finally come home to roost.

On March 5, 1977, petitioner discovered and reported in writing a major error in the reliability formula approved by supervisor Bialick and used in testing the defense network. (Tr. 116). No ackowledgement of the error or its correction was made by Bialick or Champaign and the erroneous formula continued to be used to calculate network reliability data for status

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[2]Despite the illicit nature of this conflict-of-interest association between the two defendants, the Fourth Circuit ruling in the case at bar made no recognition of the fact.

reports to top management in the Department of Defense. (Tr. 116-118; Pl. Ex. 198).

Recognizing the reliability deficiencies for what they were, a threat to the Presidential mission itself, engineer Bradley went outside agency channels for the first time in April 1977 to seek help on what he perceived to be a major vulnerability in the U.S. defense. His first visit was to his Congressman. When the word got back to the agency, Bradley was given a 90-day notice of pending Unsatisfactory Performance Rating. The law mandated such notice, for assistance to the employee. 5 U.S.C. 4304(b). Exhibit E at Appendix.

On April 28, 1977, Bradley made a second visit to seek help on the urgent national defense issue, this time to the National Security Council. (Pl. Ex 275A).[3] Within a matter of days, the word leaked back to the agency. The 90-day notice, mandated[4] by statute, was aborted at the 15th day, on May 19, 1977, at which time the engineer was given notice of formal charges to remove him from his job. The "new" charges proved to be not new at all, but duplicative of those charges issued earlier with the 90-day promise. Conspirator Champaign had finally achieved the objective of the four-year old vendetta.

[It is important to note that evidence of both the violated 90-day promise and the duplicated nature of the removal charges was excluded from presentation before the district court because of that court's collateral estoppel ruling.]

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[3]Held to be not admissable pursuant to October 18, 1978 Order by the district court on the basis of collateral estoppel.

[4]The agency maintains that it is not necessary to issue an Unsatisfactory Performance Rating in order to remove an employee. Petitioner disagrees, noting that the agency did not have to invoke the statute, but having done so at its own option, was obliged in good faith to give petitioner the 90-day assistance period created by statutory mandate, as well as due process rights of a hearing afterward also provided by the statute, in the event that his 90-day performance assessment proved to be adverse to him.

In response to a Congressionally-authorized investigation of the defense computer network, the U.S. General Accounting Office issued a Report To The Congress on December 14, 1979, fully corroborating the same vulnerability in the vital defense network about which petitioner had sought help, two years earlier, from the National Security Council. The GAO report, LCD-80-22, further incorporated direct references to several official reports prepared by, and signed by petitioner. That report is now a part of the Congressional record and the case at bar.

Based on this new and material evidence, and the evidence of defendant Bialick's previously undisclosed relationship to the defendant Computer Sciences Corp., the Merit Systems Protection Board decided that an erroneous decision may have been made in petitioner's case, and opted to reopen the case, on its own motion, for a new hearing. The previous examiner's decision to sustain petitioner's removal was vacated. Opinion And Order, Oct. 17, 1980, Appendix, Exhibit D.

On October 22, 1980, petitioner requested the Fourth Circuit to remand his case to the district court to recognize the fact that petitioner's case had not been fully presented, as the administrative tribunal had just done, and to correct the damage caused by the collateral estoppel ruling of the district court. Rule 60(b)(5) of the Federal Rules of Civil Procedure gives the appellate court the authority to relieve a party from a final judgment if "a prior judgment upon which it is based has been reversed or otherwise vacated." Nevertheless, four months later, in its ruling of March 13, 1981, the appellate court denied petitioner's request for remand. Appendix. Exhibit A at footnote 2.

On April 2, 1981, petitioner's seven-day re-hearing before the Merit Systems Protection Board was concluded, the Honorable Judge John J. McCarthy presiding. The decision of the Board is now imminent, as this petition goes before the Court. The issue before that tribunal is whether petitioner was removed for reprisal reasons on the part of his supervisors, or for the good of the Service.

* * * * * * * * *

The basis for federal jurisdiction in the court of first instance was premised upon 28 U.S.C. 1332(a)(1)(1970). The federal district court also had jurisdiction of petitioner's claim pursuant to 42 U.S.C. 1985(1) of the Civil Rights Act inasmuch as the defendants' actions as alleged included conspiracy and acts in furtherance thereof. Jurisdiction with respect to such claims is conferred by the provisions of 28 U.S.C. 1331(a) and 1343(1), (2), and (4).

## REASONS FOR GRANTING THE WRIT

## ARGUMENT I

### THE DOCTRINE OF COLLATERAL ESTOPPEL SHOULD NOT HAVE BEEN APPLIED TO PROHIBIT EVIDENCE AVAILABLE FROM PETITIONER'S ADMINISTRATIVE DISMISSAL HEARING FROM BEING PRESENTED IN DISTRICT COURT TORT/CONSPIRACY ACTION.

### A. Standards for the Application of Collateral Estoppel.

Petitioner respectfully urges this Honorable Court to exercise its supervisory authority over the decisions of the lower courts in the matter of the collateral estoppel issue for three primary reasons:

1. Estoppel has been employed as a legal technicality to avert justice rather than to aid judicial efficiency;

2. Estoppel has restrained the presentation of evidence which would have conclusively demonstrated the lack of good faith on the part of defendants who now hide behind the shield of immunity;[3]

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[3]Of the 500, and more, exhibits submitted by petitioner Bradley at the pre-trial conference in the district court, only 67 or less than 15% were admitted at trial.

> 3. This Court has, in numerous recent decisions, consistently ruled that the delicate immunity question shall be resolved on the basis of fact, not legal technicalities as in the case sub judice.

Long established precedent in other circuit courts has held that for collateral estoppel to apply to the litigation of an issue where there has been a prior judgment rendered binding the parties to the second suit, or their privies:

> [T]he judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended. *Tipler v. E. I. Du Pont de Nemours and Co.*, 443 F.2d 125, 128 (6th Cir. 1971).

Thus, while the claim or demand need not be identical, the "issue" decided in the prior litigation must have an identity to that presented in the action at bar. *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 323-324, 91 S. Ct. 1434, 28 L.Ed.2d 788 (1971).

The Fourth Circuit has noted that the rule as to the application of the doctrine of collateral estoppel in Virginia is that "under certain circumstances once the party against whom the former judgment was asserted had been afforded a full and fair day in court and a reasonable opportunity to be heard on all the relevant issues . . . a plea of estoppel by judgment ought to be recognized." *Graves v. Associated Transport, Inc.*, 344 F.2d 894, 897 (4th Cir. 1965).

But the "full and fair day in court" noted in *Graves,* supra, has so far been denied to petitioner. The record shows that petitioner was collaterally estopped from presenting evidence of his reprisal removal in the district court, — because his removal had allegedly already been litigated before the Civil Service Commission. Then, paradoxically, the Civil Service Commission (now Merit Systems Protection Board), ruled that petitioner "was unduly restricted at the [administrative] hearing in development of

the evidence supporting his claim of reprisal" and further acknowledged a First Amendment violation integral to petitioner's dismissal from the Federal Service. This ruling decisively contradicted the district court's ruling that the matters collaterally estopped had been previously litigated by the administrative tribunal. Opinion And Order of the Merit Systems Protection Board, Appendix Exhibit D.

As a result of the Order of this administrative tribunal, petitioner requested the Fourth Circuit ' remand his case to the district court, so that he could once again look forward to the due process which had so far been denied him, as well as a jury trial, which had also been denied. This request was also denied by the appellate court as a part of its ruling of March 13, 1981. Appendix, Exhibit A. The appellate court further refused to even address the collateral estoppel ruling of the lower court which had so devastated petitioner's case. By this series of judicial rulings, petitioner has been placed in a "catch-22" situation from which he could not extricate himself to present evidence in support of his Complaint.[6]

In a recent case, the 5th Circuit stated the requirements for the application of the collateral estoppel doctrine as follows:

> (1) the issue to be concluded must be identical to that involved in the prior action;
>
> (2) in the prior action the issue must have been 'actually litigated'; and
>
> (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *International Assoc. of Machinists & Aero. Workers v. Nix,* 512 F.2d 125, 132 (5th Cir. 1975).

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[6]The transcript of Oral Argument before the appellate court at Richmond, Va. on June 4, 1980 reveals this interesting excerpt at page 19....

"The Court: Well, it would be very unjust if the Civil Service Commission did reopen the case and make a contrary (ruling) . . ."

The burden of proof for establishing the appropriateness of the application of the doctrine of collateral estoppel is "a heavy one", (*United States v. Seijo,* 537 F.2d 694, 697, 2nd Cir. 1976), and when a defendant seeks to assert the defense against the consideration of certain issues in an action, a long line of cases has held without attack that such defendant has the burden of showing that the issues sought to be excluded "were actually litigated and determined in the former action." *Happy Elevator No. 2 v. Osage Const. Co.,* 209 F.2d 459, 462 (10th Cir. 1954); *See also, Glass v. United States Rubber Co.,* 382 F.2d 378, 384 (10th Cir. 1967); *United States v. Davis,* 460 F.2d 792, 796 (4th Cir. 1972); *Turley v. Wyrick,* 554 F.2d 840, 842 (8th Cir. 1977), cert. denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780; *United States v. Cala,* 521 F.2d 605, 608 (2d Cir. 1975).

In the case at bar, the actions of the defendants do not rise to the level of meeting the burden of proof of showing that the issues sought to be excluded from consideration by the district court were "actually litigated and determined" in the course of the appeal of petitioner Bradley before the Federal Employee Appeals Authority of the Civil Service Commission.[7]

On September 18, 1978, defendants Bialick and Champaign, filed a Motion for the district court to preclude the admission of any testimony at trial that would tend to relitigate, undermine, or contradict previous decisions in which petitioner was a party. The motion was accompanied by a bare bones memorandum which asserted that all the issues pertaining to the actions of the two federal supervisors with reference to the letter of reprimand and the removal proceedings had previously been litigated. Therefore, they argued, the doctrine of collateral estoppel operated to preclude the introduction of evidence in the district court concerning those matters previously considered in the grievance action, filed on August 10, 1976, and the removal hearing, decided August 9, 1978. The district court ruled on 18 October 1978, less than two weeks prior to trial, that ". . . no evidence as to the propriety of, or fact of, or cir-

[7]Name changed to Merit Systems Protection Board.

cumstances giving rise to, plaintiff's removal, shall be admitted in evidence at trial either as items of plaintiff's alleged damages or as substantive evidence in support of the various causes of actions set forth in the complaint." (Appendix, Exhibit B).

The facts in the instant case are that the removal proceedings considered charges of inefficiency, resisting competent authority, and making false and misleading statements, the third charge of which was not sustained by the Appeals Authority. *None of the Defendant in the district court action were parties to the appeal before the Civil Service Commission.* The charges in the district court suit appealed herein were common law and statutory torts. The Civil Service Commission, through its Federal Employee Appeals Authority did not, jurisdictionally, have the authority to consider these tort actions, the elements of which were not a part of the evidence considered in the grievance hearing or removal proceeding.

This Court, in often-cited language, stated the standard to be followed to determine whether or not the doctrine of collateral estoppel is appropriately applied more than a hundred years ago. That standard has stood the test of time:

> [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. *Cromwell v. County of Sac,* 94 U.S. 351, 353, 24 L.Ed. 195 (1877).

Defendants made only the most cursory showing that any of the elements outlined above existed in the instant case. No showing was made by defendants why the court should ignore the requirement that the issues, claims or defenses must necessarily have been actually litigated and determined. As the Fourth Circuit said in *United States v. Davis, supra,* "[t]he party seeking the protection of the principle has the burden of proving that the precise issue or question he seeks to preclude was raised and determined in the first action." Id at 796.

Leaving aside for the moment the *possibility* of meeting that burden, in a situation where, as here, the previous and instant actions present such widely divergent causes of action, defendants clearly did not prove that the issues to be precluded had been raised and determined, and hence did not meet the required burden of showing the appropriateness of the application of the doctrine of collateral estoppel in the instant case.

**B. The Civil Service Commission Appeal.**

The facts in the instant case strongly indicate that such a burden *could not* be met. The record in the district court proceeding below, and that of the removal proceeding before the Civil Service Commission reflect a total lack of identity between the issues in the two proceedings.

The Civil Service Commission proceeding (Appeal of John H. Bradley Under Part 752, Subpart B of the Civil Service Regulations) considered three basic issues: 1) Had Appellant been an inefficient employee in his later assignment at the Defense Communications Agency? 2) Had Appellant resisted competent authority? and 3) Had Appellant made false and misleading statements?

Thus, the focus of scrutiny of the Civil Service Commission proceeding was an examination of the behavior of Bradley in his capacity as an employee of the Defense Communications Agency. The *factual issues were limited strictly to the charges made against petitioner, by supervisors. Champaign and Bialick,* and

*the proof permitted by the hearing examiner dealt solely with whether or not he had committed the acts charged.* Other evidence, including that which would go to prove that petitioner was the victim of reprisals for his warnings concerning failures in the reliability of the President's crisis computer network, was ruled irrelevant to the issues before the Commission. Evidence in mitigation of his behavior, or indicating extenuating circumstances, was likewise not considered.

The Commission's own regulations contradict this restraint of evidence:

> It is not proper to restrict his [the employee's] answer to matters relating solely to the agency's reasons for proposing adverse action against him. He must be permitted to plead extenuating circumstances or make any other representations which he considers appropriate. Federal Personnel Manual, Supplement 752-1, Section S6-2c.

Moreover, the Court of Claims has bolstered such regulations by ruling that even where a Government employee *fails to deny* the charges against him, he has a right to be heard on facts in mitigation:

> To answer to charges, or claims, one need not necessarily plead the general issue, denying that he did the things which he is alleged to have done. He may plead in confession and avoidance, and that is an answer, in law, and in life. In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged. *Washington v. United States,* 147 F. Supp. 284, 288 (Ct.Cl.1957).

Thus the Civil Service Commission failed to consider evidence in the case even to the outer limit of its narrow jurisdiction, (5 U.S.C. 302, 7512, 7701), a circumstance which would appear to weaken any assertion that such issues had been fully litigated

or finally decided in this prior proceeding, upon which the application of collateral estoppel is based.

**C. The District Court Action.**

The causes of action before the federal district court in the case sub judice were of a wholly different nature from those charges against petitioner. They were directed against persons in their private capacities, and not as Government representatives. They dealt with a four-year time period which only partially coincided with the one-year time period considered in the Civil Service Commission proceeding. The allegations before the district court were:

1. Harassment, defamation and intentional infliction of emotional distress on the part of defendants Bialick and Champaign;

2. Libel on the part of Computer Sciences Corporation, Hollander and Kepler, defendants herein;

3. Libel on the part of Bialick and Champaign;

4. Conspiracy among all defendants to injure petitioner.

These causes of action in the federal district court are torts, cognizable under Federal statute 42 U.S.C. 1985, Constitution, or common law.

Because the district court below precluded the introduction of evidence which would have gone toward establishing libel *per* removal of petitioner from his position with the Defense Communications Agency, petitioner was precluded from introducing incremental facts which would have gone to show a course of conduct, in which a series of actions, which might individually be considered innocuous, would make a prima facie case as to the counts alleged in the complaint.

With reference to the other causes of action, too, the Commission could not and did not attempt to hear or decide the issues. A finding by the Commission that the petitioner was inefficient would in no way negate a finding that defendants had

defamed him. Moreover, the Commission refused to consider evidence which would have gone toward establishing libel *per quod*. A finding of inefficiency or resistance to authority would not have foreclosed a finding that petitioner had been defamed, because defamation, requiring a publication, can be demonstrated in spite of the possible truth of the publication. Nor were the elements of intentional infliction of emotional distress allowed to be presented by the hearing examiner.

It is therefore indisputable that the causes of action in the case at bar could not have been litigated before the Civil Service Commission. The limited jurisdiction of that tribunal does not encompass torts, either statutory or common law. Moreover, the parties defendant in the case in the federal district court, either private citizens or government employees acting outside the scope of their employment, were not, nor could they have been, parties to the proceedings before the Civil Service Commission.

## ARGUMENT II

**THE SHIELD OF QUALIFIED IMMUNITY SHOULD NOT HAVE BEEN GRANTED BY DIRECTED VERDICT TO DEFENDANT CORPORATION AND FEDERAL SUPERVISOR WHO WAS STOCKHOLDER AT ALL MATERIAL TIMES IN THE CORPORATE CONTRACTOR, WHERE THE CAUSE OF ACTION WAS FOR CIVIL RIGHTS CONPIRACY BETWEEN THE TWO DEFENDANTS.**

### A. The Immunity of Public Officers was incorrectly applied in the instant case.

The third cause of action in the Complaint in the action below charged libel and defamation against petitioner's supervisors, Bialick and Champaign. On 18 October 1978, prior to the trial in this matter, the Court dismissed that count of the Complaint, citing the doctrine of the immunity of public officers. The Court said:

> Moreover, the Letter of Reprimand was obviously within the outer perimeters of the line of duty of

> Bialick and Champaigne (sic), and the wrongs complained of with regard to the Letter of Reprimand are common law torts — not constitutional violations. Consequently the immunity doctrine of *Barr v. Mateo,* 360 U.S. 564 (1959), is applicable, *Granger v. Marek,* No. 76-1582, August 30, 1978 (8th Cir.). Since the Third Cause of Action is based on the damages allegedly inflicted by the Letter of Reprimand, issued by Bialick and Champaigne (sic), that cause of action will be dismissed.

Thus, petitioner was prevented from putting on any evidence concerning the third cause of action in his Complaint.

Further, at the close of the petitioner's case below, the district court granted a motion for directed verdict, citing, *inter alia,* the *Barr* doctrine of immunity. The Court stated:

> But the government defendants are entitled to a directed verdict for a more basic reason . . . . They are immune. Barr v. Mateo is very much alive and Butts (sic) v. Economou makes that quite clear.
>
> There is no allegation here of a violation of a constitutional right. There is no evidence of any exceeding by the governmental defendants of their statutory authority.
>
> This is no more than a common law tort of conspiracy or of intentional infliction of emotional distress.
>
> Consequently, these defendants are immune because what they did was well within the outer perimeters of their authority, and they are immune under *Barr v. Mateo,* which relied on the case Mr. Williams cited of Gregor v. Vittle (sic) and Granger v. Maric (sic) in the Eighth Circuit plainly applies to this case. Tr. 437-438.

Thus, on all counts in the Complaint against Bialick and

Champaign, the defendants below who were Government employees, the district court either dismissed the cause of action prior to trial (Third Cause of Action), or directed a verdict in favor of the defendants (First and Fifth Causes of Action).

The immunity ruling of the lower courts in the case sub judice have hinged on the premise that petitioner had enunciated no Constitutional claim. Petitioner argues that the essential Constitutional issue was implicit in petitioner's Complaint brought under Section 1985 of the Civil Rights Act. It is submitted that a conflict exists between the Fourth Circuit ruling herein and the ruling of the Ninth Circuit (et al) in *Mark v. Groff*, 521 F.2d 1376 (1975):

> "Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in 1983 suits."

And Id. at 1380, the Ninth Circuit cites *Scheuer v. Rhodes:*

> "Applying Scheuer to this case, we hold that I.R.S. agents are entitled to no more than a qualified immunity for acts performed in the course of official conduct. A remand for further proceedings is necessary because 'the scope of that immunity will necessarily be related to facts as yet not established' below. Scheuer, supra, 416 U.S. at 243, 94 S.Ct. at 1689."

A limitation was imposed by *Barr* upon the appropriateness of the application of the privilege that the official's act must have been "within the scope of his powers". This, following an earlier case, was taken to mean "that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . . ." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). *Barr, supra,* further states that "[t]he fact that the action . . .

taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable . . . ." at p. 575. The application, then, of the *Barr* doctrine of absolute privilege was broad, supported by the criteria "within the scope of his powers" or "within the outer perimeter of [his] line of duty".

However, while *Barr* no doubt still "is very much alive"[8] as the court has said, it has undergone modification. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) gave rise to a claim for relief against Federal officials acting under color of their authority, because of a violation of a plaintiff's Fourth Amendment rights at 389. Addressing a problem which the *Barr* majority noted but did not resolve, *Bivens* noted that "[a]n agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." at 392.

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.*

Hence, *Bivens* gave rise to a cause of action sounding in constitutional tort – specifically a violation of Fourth Amendment protection against unreasonable searches and seizures. *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 395, (1978), cited by the court below, accepted the *Bivens* Fourth Amendment constitutional tort reasoning, and further developed it by indicating that a violation of an individual's constitutional rights is beyond the scope of an official's authority, implying that such actions would fall outside the privilege. Id. at 490-491. Moreover, the *Butz* court held that the necessary immunity of federal officials should be no greater than the limited immunity granted state officials. Id. at 500-501.

---

[8] *Granger v. Marek*, 583 F.2d 781 (6th Cir. 1978), cited by the Court involved a case where only common law torts were alleged. That is not the case here, where statutory tort is alleged, and constitutional deprivation can be shown.

> We . . . hold that, in a suit for damages arising from unconstitutional action, federal executive officers exercising discretion are entitled only to the qualified immunity specified in *Scheuer,* subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. Id at 507.

The "exceptional situations" requiring absolute immunity were noted by the Court to be circumstances where officials were faced with an 'atmosphere of confusion, ambiguity, and swiftly moving events'." Id. at 497.

Hence, the immunity of federal officials was limited, not absolute, just as that of state officials – at least as regards Fourth Amendment violations. This Court, in a recent case, has relied upon *Bivens* to extend the range of constitutional tort actions to Fifth Amendment deprivation of property claims. *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146, 1155-1157 (4th Cir. 1976). See also, *Gardels v. Murphy,* 377 F.Supp. 1389 (N.D. Ill. 1974) which held *Bivens* gives rise to actions for damages for violation of the First, Fourth and Fifth Amendments. Further, also citing *Bivens,* the Third Circuit has proposed that an action for damages may be implied from a right given in a federal statute:

> Thus, one who seeks to secure damages *for violation of a statute* or a constitutional provision must demonstrate *a legislative* or constitutional intention that the provision relied upon protects the specific plaintiff from harm and comprehends award of damages to him when such harm occurs. (emphasis supplied). *Davis v. Romney,* 490 F.2d 1360, 1368 (3rd Cir. 1974).

Thus it is clear that the citadel of *Barr* absolute privilege for public officers has been considerably breached. What remains is an immunity much qualified and limited. The *Bivens* court remanded the case to the Second Circuit Court of Appeals for consideration of the question of the immunity enjoyed by

federal officials following its decision. *Bivens, supra,* p. 398. On remand, the Second Circuit held that an offense would be privileged if the officer acted "in good faith and with a reasonable belief in the validity . . ." of his action. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.,* 456 F.2d 1339, 1341 (2d Cir. 1972). There is therefore a burden of proof upon the public official to show that the actions complained of are immune under the *Barr* doctrine as modified by *Bivens.* That showing must be two-fold, one part objective, and the second part subjective:

> . . . the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. *Bivens, supra,* p. 1348.

While the *Bivens* decision applied this standard specifically to police officials acting under color of federal authority, petitioner argues that such a standard could be reasonably applied to the actions of other federal officials accused of constitutional or statutory torts.

To the extent that the courts below relied upon a doctrine of absolute immunity from prosecution of federal officials, it was error. Under the doctrine of *Davis v. Romney, supra,* petitioner alleged in his Complaint a violation of a right created by statute, 42 U.S.C. 1985(!). Petitioner's allegations are clearly cognizable under the Fifth Amendment as unconstitutional deprivation of property in the sense that petitioner's property rights in his Government position with the Defense Communications Agency were destroyed by the concerted actions of both government and corporate defendants.

Bialick and Champaign had a burden of proving that their actions were protected by the limited immunity available to public officials. The district court below made no requirement that the burden be met. To the extent its ruling was based upon public officer immunity, it should be reversed.

**B. The Qualified Immunity of a Letter to a Government Superior Complaining About the Performance of his Subordinate was Incorrectly Applied in the Instant Case.**

In directing a verdict for the private defendants below (Computer Sciences Corporation, Hollander and Kepler), the district court stated:

> . . . a letter complaining to a governmental superior about the performance of his subordinate is a classic case of qualified privilege, and a qualified privilege makes statements otherwise defamatory not actionable unless the qualified privilege has been abused and consequently lost. And it can only be abused and consequently lost, that is the privilege, if there is some showing of actual malice or use of language which is intemperate or disproportionate to the occasion or not in good faith and without an honest belief in its truth or deliberately adopting a mode of speaking or words which give unnecessary publicity to the word or arranging to communicate the letter to persons who do not have an interest in it or for the purpose of gratifying some evil or sinister motive or with such gross indifference or recklessness as to amount to a wanton or wilful disregard for the rights of the plaintiff.
>
> There is no evidence of anyone (sic) of those here. Consequently, the qualified privilege has not been shown to have been abused and consequently lost and since the facts which give rise to that privilege are not in dispute it is unnecessary to submit that issue to the jury, that is whether there is a qualified privilege or not.
>
> The evidence of the subject matter of the letter being a matter which both the writer and recipient of the letter have a legitimate interest is clear. Consequently, the Court holds as a matter of law that the letter is qualifiedly privileged and since there is *no evidence* of

> any of the elements necessary to find that the privilege was lost, the letter cannot be defamatory. (Emphasis supplied). Tr. 439-440.

The standard for the qualified immunity of a communication such as the one described above is set out in *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), cited by counsel for the private defendants in his argument to the Court upon the close of plaintiff's case below. (Tr. 411, ff.). Specifically, the Seventh Circuit stated:

> We think it plain that presenting complaints to responsible government officials about the conduct of their subordinates with whom the complainer has had official dealings is analogously central to the protections of the right to petition. *Stern,* at 1342-1343.

*Stern* further implies, however, that the *sole* reliance upon such a complaint to state a claim would be insufficient as being protected by the qualified privilege, but that where injury resulting from other actions of a defendant as well is alleged, such a communication may not be privileged. The rule is that:

> a § 1985(1) complaint is insufficient to state an actionable federal claim insofar as it *only* alleges injury resulting from complaints about the plaintiff officer's official performance lodged by the defendants with the officer's superiors. Id at 1344.

In the instant case, petitioner alleged much more, and offered evidence to prove his allegations. Examples follow. Testimony was elicited that prior to sending the complaint to the Defense Communications Agency, defendant Hollander, contract representative of Computer Sciences Corporation and defendant herein, discussed the letter with Bialick himself. Defendant Bialick was employed by Computer Sciences Corporation in the years 1970 to 1974, immediately prior to his employment by the Defense Communications Agency. (Tr. 186). Further, during the subsequent period of his federal employment 1974 through

1977, Bialick admitted to owning 1700 shares of Computer Sciences Corporation stock. (Tr. 187). As petitioner's supervisor, he was involved in the process resulting in the granting of a contract to Computer Sciences Corporation for the development and maintenance of software for the defense computer network. (Tr. 188-195). Petitioner discovered and reported an error in a formula used to test reliability in the defense computer network including its software, which went unacknowledged by Bialick. (Tr. 116-118). Defendant Kepler was Bialick's subordinate when Bialick was employed by Computer Sciences Corporation. (Tr. 147). Evidence was elicited indicating that in fiscal year 1976 Computer Sciences Corporation was granted a contract for $752,000 from the Defense Department, with the government action officer designated as Bialick. (Pl. Ex. 113).

It is clear from the above examples, that petitioner herein offered much evidence to show that the actions of Computer Sciences Corporation and the other private defendants were not limited to merely writing and sending the letter complained of. The total surrounding situation clearly encompasses an interpretation of the actions as the carrying out of a common design, the protection of the interests of the corporation and their private interests, which design had as a subordinate goal the silencing of petitioner, who was a persistent and informed critic of the product of the corporation under its government contracts. Actual malice could reasonably be imputed therefrom.

Moreover, petitioner introduced evidence (Pl. Ex. 259), that the charge of "misrepresentation" was made against him, a very serious charge, involving language falling under the district court's own standard of being "disproportionate to the occasion or not in good faith", *supra.* Hence, the qualified privilege has been abused, it being shown that the letter was not written and sent in a vacuum, but rather as one action (which in itself had been previously discussed between sender and recipient) in a long series of actions whose goal was the neutralization of petitioner as a threat to the corporation's relationship with the Defense Communications Agency.

Furthermore, had petitioner been permitted to introduce evidence precluded by the court's ruling on collateral estoppel, an even stronger case would have been made.

The actions of the private defendants, therefore, do not meet the requirements of the qualified privilege, and the Court erred in directing a verdict, as to the causes of action against them, in their favor on the basis of the qualified privilege of a letter to a governmental superior complaining about the performance of his subordinate.

### C. Plaintiff Below Presented Sufficient Evidence to be Considered by the Jury as Opposed to a Directed Verdict.

Motion was made by the defendants below (Tr. 409) at the close of petitioner's presentation of evidence, for directed verdict. The court granted the motions, ruling that the actions complained of were immune (Tr. 437, 439). Petitioner has shown, *supra,* that the immunity arguments are invalid in the instant case.

However, the district court also ruled that the evidence presented was insufficient to go to the jury on the First Cause of Action against Bialick and Champaign. The Court stated:

> I will concede for the purpose of ruling on a motion for directed verdict that there may have been evidence from which a jury or factfinder could conclude that the defendants' actions were intentional, although whether he had the specific purpose of inflicting emotional distress or knew that the emotional distress would likely result is argueable (sic) at best. But I am perfectly willing to say that there is a causal connection between the plaintiff's work problems and his emotional distress and that the emotional distress is severe. But this conduct is not the kind of conduct that is outrageous or intolerable or such that it offends against the generally accepted standards of decency and morality.

> It is rude perhaps to cut off Mr. Bradley in the meetings. It may be impolite to treat him with indifference, and it may not be entirely social not to take him seriously. But these are the kinds of conduct that the Court referred to when it said that the types of cases where bad manners are involved is not a case of intentional infliction of emotional distress.
>
> There is not other evidence here of conduct, as I say, that is outrageous or intolerable. So that claim must fail. (Tr. 436-437).

In the first instance, the court neglected evidence concerning the two secret and damning memoranda written by defendant Champaign to petitioner's then-supervisor (Pl. Exs. 54,60), complaining falsely of petitioner's performance; the transfer of petitioner under a known-hostile supervisor (Pl. Ex. 68), the removal of petitioner's reliability engineering duties (Tr. 63), the assignment of petitioner to clerical duties, etc.

*Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974), cited by the court, and by defendants requires "outrageous and intolerable" conduct, such as "offends against accepted standards of decency and morality." at 342. In determining that the conduct alleged and proven by petitioner did not sink to the requisite depths of intolerabilty, the district court looked at each item of conduct in isolation, determining it tolerable (though perhaps rude or impolite) before moving on to consider the next, and then ignoring defendant Champaign's secret and damning memos entirely.

But conduct which, taken separately, may be tolerable, becomes intolerable when considered as a pattern, with cumulative impact. The facts in the instant case include a course of conduct by a trained psychologist (Dr. Bialick) against an engineering professional in long-term employment with the Federal Government which rises to the level of the outrageous and intolerable. Therefore, other evidence of conduct which, taken together as cumulative, clearly indicates the requisite intolerable conduct, and with the necessary intent, is in the

record. Petitioner's psychiatrist, considering the conduct cumulatively, saw a causal connection between the conduct and petitioner's condition. (Tr. 355-356), as did also the district court. (Tr. 436)

Moreover, even without that other evidence, the evidence cited by the judge is sufficient to defeat a defense motion for a directed verdict.

The Fourth Circuit itself has stated the standard for the application of a directed verdict:

> . . . it is too well settled to warrant discussion that, on such motion [for directed verdict], the evidence must be taken in the light most favorable to the party against whom the directed verdict is asked and that all conflicts must be resolved in his favor. *Aetna Casualty & Surety Co. v. Yeatts,* 122 F.2d 350, 352 (4th Cir. 1941)

Further:

> Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. *Id.*

Such is clearly not the case here. The language of the court's ruling makes it clear that it weighed the evidence, and chose to disbelieve it, in violation of the rule. Therefore, it was error for the district court to direct a verdict in favor of defendants Bialick and Champaign on the basis of insufficient evidence.

As to the private defendants (Computer Sciences Corporation, Hollander and Kepler), the case is clearer. The Court admits, in its ruling that the letter of March 3, 1976, complained of by petitioner, is "barely defamatory. (Tr. 439). The judge, while improperly weighing the evidence presented, concluded that the standard was met to show defamation. Hence, absent the privilege, which petitioner has shown to be improper here, there was sufficient evidence for the jury to find defamation. It was

error for the Court to direct a verdict in favor of the private defendants.

As to the conspiracy cause of action (the Fifth Cause of Action in the Complaint below), the district court stated:

> Nor is there any evidence as far as either the government or the private defendant, for that matter of any conspiracy. There is no evidence of any concerted action to accomplish an unlawful purpose.
>
> Even were the governmental defendants not otherwise immune, as I feel they are, this just isn't any evidence of the type of conspiracy that 1985, subsection 1 talks about. (Tr. 437).

Petitioner did present evidence going toward the establishment of concerted action on the part of all of the defendants. The evidence incorrectly excluded by collateral estoppel would have shown further conduct going to establish concerted action.

Moreover, *Stern, supra,* explicitly states that "mere" defamation can indeed amount to a violation of § 1985(1). *Stern, supra,* p. 1338.[9] Therefore, as to the conspiracy count as well, the district court erred in granting a directed verdict against petitioner.

Further, as Justice Black stated in a concurring opinion in *Adickes v. Kress & Co.*, 308 U.S. 144, 176, 90 S.Ct. 1598, 26 L.Ed.2d 142, 165 (1970), "[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide."

[9]The *Stern* facts relating to the "letter of complaint" filed by corporate defendant U.S. Gypsum are uniquely different from the case at bar. U.S. Gypsum was not engaged in contract work for the federal government related to Stern's duties, while Computer Sciences Corp. was such a contractor. Stern's duties did not require him to be critical of U.S. Gypsum's work, but Bradley's duties did require that Government loyalty. Stern's supervisor did not hold a stockholder relationship with U.S. Gypsum, but supervisor Bialick did hold such illicit relationship with CSC. Stern's supervisor did not cooperate with the preparation of the "letter of complaint" sent by U.S. Gypsum, but supervisor Bialick did participate with Computer Sciences Corp. in preparing the defaming letter against petitioner Bradley.

The cumulative effect of the erroneous rulings of the courts below concerning the immunity of public officials, the qualified privilege of the complaint letter, and the collateral estoppel ruling was to deny petitioner the protection of his Seventh Amendment right to trial by jury. It is settled that the right to trial by jury applies to suits at common law. Further, the right extends beyond the common law forms of action recognized at the time of the adoption of the Seventh Amendment, and may be construed to embrace all suits not of equity or admiralty jurisdiction. *Curtis v. Loether,* 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Pons v. Lorillard,* 549 F.2d 950 (4th Cir. 1977). This Court has said that where equitable and legal claims are joined, the jury trial right on the legal claims must not be infringed, "either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." *Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729, 736 (1970). None of the above criteria would militate against reference of the instant claims to a jury. Further, in a doubtful case, this constitutional right to trial by jury should be accorded the benefit of the doubt. See, *Rogers v. Loether,* 467 F.2d 1110, 1121-1122 (7th Cir. 1972). The district court's actions substantially prevented petitioner from exercising his Seventh Amendment jury trial right.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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August 10, 1981

# APPENDIX

# APPENDIX

## EXHIBIT A

United States Court of Appeals,
Fourth Circuit.

Before HARRY PHILLIPS, Senior Circuit Judge,* and RUSSELL and WIDENER, Circuit Judges.

WIDENER, Circuit Judge:

Urban A. Lester, Washington, D.C. (Richard N. Bagenstos, Alvord & Alvord, Washington, D.C., on brief), for appellant.

George P. Williams, U.S. Atty., Alexandria, Va., Paul F. Sheridan, Arlington, Va. (Siciliano, Ellis, Sheridan & Dyer, Arlington, Va., on brief), for appellees.

John H. BRADLEY,

*Appellant,*

v.

COMPUTER SCIENCES CORPORATION, *et al.*,

*Appellees.*

No. 78-1893.

Argued June 4, 1980.

Decided March 13, 1981

An action arising from removal of plaintiff from his civil service position was instituted against federal officials and a government contractor. The United States District Court for the Eastern District of Virginia, at Alexandria,

*U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Albert V. Bryan, Jr. J., granted motions of defendants for directed verdict, and plaintiff appealed. The Court of Appeals, Widener, Circuit Judge, held that: (1) federal officials were immune from civil servant's charges of harassment, defamation and intentional infliction of emotional distress in connection with official reprimand, warning notice of unsatisfactory performance, notice of denial of an agreed salary increase, and notice of proposed removal from position absent an allegation of constitutional violation or assertion that federal officials acted beyond scope of their authority, and (2) letter which government contractor sent to civil servant's superiors and which was openly critical of civil servant's use of technical notes provided by contractor enjoyed a qualified privilege and, as such, was not a basis for claim of libel against contractor and its employee, notwithstanding whether grievance which was subject of letter was political or motivated by financial self-interest.

Affirmed.

**1. United States – 47**

Federal officials were immune from civil servant's charges of harassment, defamation, and intentional infliction of emotional distress in connection with official reprimand, warning notice of unsatisfactory performance, notice of denial of an agreed salary increase, and notice of proposed removal from position absent an allegation of a constitutional violation or assertion that federal officials acted beyond scope of their authority.

**2. Constitional Law – 91**
**Libel and Slander – 48(2)**

Letter which government contractor sent to civil servants' superiors and which was openly critical of civil

servant's use of technical notes provided by contractor enjoyed a qualified privilege and, as such, was not a basis for claim of libel against contractor and its employee, notwithstanding whether grievance which was subject of letter was political or motivated by financial self-interest, where right to petition was involved, and letter, which was not scurrilous, anonymous, or full of unfounded charges, dealt with a problem contractor had in coordinating its efforts with civil servant, explained specific problem, and ended with suggestions for improving its coordination with responsible government officials. U.S.C.A. Const. Amend. 1.

**3. Constitutional Law – 90.1(1)**

Public criticism of governmental policy, government operations, and government officials is at the very core of the constitutionally protected free speech area. U.S.C.A. Const. Amend. 1.

**4. Constitutional Law – 91**

The fact that a grievance does not generate political support makes the individualized exercise of the right to petition all the more important. U.S.C.A. Const. Amend. 1.

**5. Constitutional Law – 91**

Since a valid complaint, by its very nature, almost always intends to injure the official complained of, this should not affect the propriety of the use of the First Amendment right. U.S.C.A. Const. Amend. 1.

**6. Libel and Slander – 48(2)**

Government contractors and citizens in general who are aware of real or imaginary shortcomings of government employees should not be dissuaded from communicating their concerns to the proper authorities who can evaluate such complaints and take appropriate action if complaints are justified. U.S.C.A. Const. Amend. 1.

**7. Conspiracy – 1, 7.5**

Claim of conspiracy on part of federal officials and government contractor in connection with alleged harassment, defamation and intentional infliction of emotional distress on civil servant was not a basis for establishing liability under facts in evidence whether it was considered a common-law tort or a violation of conspiratorial civil rights statute. 42 U.S.C.A. § 1985(1).

This case arises from the removal of plaintiff-appellant, John Bradley, from his civil service position. Bradley was an electronics engineer in the Defense Communications Agency (DCA). Bradley's complaint alleges several wrongs by the defendants (his former superiors, a government contractor, and its employees), and he appeals from an adverse judgment below. We affirm.

Bradley was assigned to prepare a report for the Joint Chiefs of Staff on security procedures for an intercomputer communications network. Since the defendant Computer Sciences Corporation (CSC) had a contract with the Defense Communications Agency dealing with the same subject matter and the necessary expertise, it agreed to provide assistance required to prepare the report. Defen-

dants Kepler and Hollander are employees of CSC. After some delay, CSC provided informal technical notes in handwritten form which Bradley put in typed form with no change in content, noted authorship by CSC, and submitted to the Joint Chiefs. The Joint Chiefs found the report generally unsatisfactory.

CSC wrote a letter, dated 3 March 1976, to Bradley's superiors in the DCA. The letter complained that Bradley "misrepresented" the intent of the notes produced by CSC. Several months later, Bradley received an Official Reprimand based, in part, on the charges in the CSC letter. The reprimand was signed by Bradley's supervisor, defendant Bialick. Defendant Champaign is the Chief of the appropriate division of the DCA, and several years earlier had written memoranda critical of Bradley.

In May 1977, Bradley was given a Warning Notice of Unsatisfactory Performance (May 4th), a Notice of Denial of Within-Grade Salary Increase, and a Notice of Proposed Removal from his position. In June 1977, he received a memorandum of the agency's decision to remove him from his position, and he instituted an appeal to the Civil Service Commission on July 15, 1977 of his removal on July 1st.

Bradley filed his complaint in the district court in March 1978. According to the plaintiff, the issues before that court were: (1) harassment, defamation, and intentional infliction of emotional distress on the part of defendants Bialick and Champaign, resulting in, among other things, the removal of plaintiff from a testing program in which he had participated, culminating in the letter of May 4, 1977 which was a warning notice of unsatisfactory performance; (2) libel in the form of the letter of March 3, 1976 on the part of CSC and its employees Hollander and

Kepler in which they complained to Bradley's superiors about his performance of duty; (3) libel against Bialick and Champaign, Bradley's superiors, in the form of the official reprimand dated July 13, 1976, which includes republication of the letter of March 3, 1976 from CSC to Bradley's superiors; (4) a conspiracy among all the defendants to injure the appellant.[1]

At the close of plaintiff's case, the district court granted motions for a directed verdict on behalf of all defendants.

It ruled that the March 3, 1976 letter from CSC was qualifiedly privileged, which privilege was not abused; that the evidence was insufficient to support the other charges; and that, in all events, the government defendants were immune[2]

---

[1]The above issues are taken from page 24 of appellant's brief and are either copied therefrom, or paraphrased, or only elaborated on for the purpose of clarity. The district court, see pages 1 and 2 of its opinion dated October 18, 1978, recited a greater number of issues but included those listed in appellant's brief as the matters he considered the issues before that court. By the time the trial concluded, the issues boiled down, in general terms, to those listed in appellant's brief.

[2]Defendants moved to stay proceedings in the district court pending a decision by the Civil Service Commission on Bradley's discharge. The district court stayed its proceedings over Bradley's objection that the proceeding before the Civil Service Commission had entirely different issues from the case in the district court. After the Commission upheld Bradley's removal, defendants, amended their answer to include the defense of estoppel based on the administrative decision of the Civil Service Commission. In a pre-trial order, the district court ruled that plaintiff was collaterally estopped from relitigating any matter litigated before the Civil Service Commission that was decided adversely to him. The ruling took the form of excluding from evidence the propriety of, or fact of, or circumstances giving rise to Bradley's removal, either as an item of damage or as substantive evidence in support of the various causes of action.

The court also ruled in the pre-trial order that Bialick and Champaign were immune from the libel charge with respect to the Letter of

As noted, the district court applied the *Barr v. Mateo* doctrine of immunity to the libel cause of action based on the Letter of Reprimand prior to trial and as to the balance of the case against the government defendants at the close of plaintiff's case. In directing verdicts for Champaign and Bialick, the court ruled:

> Even were the governmental defendants not otherwise immune, as I feel they are, this (sic) just isn't any evidence of the type of conspiracy that 1985, subsection 1 talks about.

---

Reprimand under the immunity doctrine of *Barr v. Mateo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and *Granger v. Marek*, 583 F.2d 781 (8th Cir. 1978).

The ruling of the district court as to collateral estoppel is strenuously contested on appeal, and, on October 17, 1980, after the appeal was argued, the Merits Systems Protection Board of the Civil Service Commission remanded the case concerning Bradley's discharge to the Administrative Law Judge because it stated that, since the charges against Bradley show on their face a mixed motivation for his removal, one of which involved Bradley's constitutionally protected conduct, its Field Office should have developed a record on that subject. Significantly, though, the remand decision of the Merit Systems Protection Board does not deal in any way with matters respecting the privilege or immunity of the defendants in this case. Neither have we had called to our attention how any evidence excluded by the order of the district court would have altered in any significant way the facts upon which the decision for the defendants was based.

Accordingly, we need not and do not decide whether the district court's ruling as to collateral estoppel was correct. We deny the motion of the plaintiff to remand the case to the district court to reconsider it in the light of the decision of the Merits Systems Protection Board.

As we explain in the body of the opinion, excepting the conspiracy count, the defendants may not be held liable because of their privilege or immunity. The conspiracy count fails for other reasons as well.

> But the government defendants are entitled to a directed verdict for a more basic reason, aside from the insufficiency of the evidence. They are immune. *Barr v. Mateo* is very much alive and Butts v. Economou makes that quite clear.
>
> There is no allegation here of a violation of a constitutional right. There is no evidence of any exceeding by the governmental defendants of their statutory authority.
>
> This is no more than a common law tort of conspiracy or of intentional infliction of emotional distress.
>
> Consequently, these defendants are immune because what they did was well within the outerperimeters (sic) of their authority . . . .

[1] Plaintiff concedes that he did not plead a constitutional violation and does not argue that the government defendants acted beyond the scope of their authority. Indeed, every act with which the government defendants have been charged is within the scope of their duties. Therefore, the district court ruled correctly that the federal officials are immune because it is

> important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

*Barr v. Mateo,* 360 U.S. 564, 571, 79 S.Ct. 1335, 1339, 3 L.Ed.2d 1414 (1959). Accord *Spalding v. Vilas,* 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896).

The trial court applied the doctrine of qualified privilege to the CSC letter of March 3rd about which Bradley complains. That letter, sent to Bradley's superiors, was openly critical of Bradley's use of the CSC provided technical notes.

[2-6] The right to petition for redress of grievance, as protected by the First Amendment, is among the liberties safeguarded by the Bill of Rights. Bradley concedes that complaints about government officials may be qualifiedly privileged because.

> presenting complaints to responsible government officials about the conduct of their subordinates with whom the complainer has had official dealings is analogously central to the protections of the right to petition.

*Stern v. United States Gypsum, Inc.,* 547 F.2d 1329, 1342-43 (7th Cir. 1977), cert. den., 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). It is true that the subject of the grievance at issue here is not political, in the sense of a reference to policy issues. It is also true that the grievance may have been motivated by financial self-interest, and that the complainer may have been aware of and pleased by the prospect of injury resulting to the official complained of (Bradley). However, public criticism of governmental policy, government operations, and government officials "is at the very core of the constitutionally protected free speech area." *Stern* at 1342. Therefore, it matters not that the subject of the grievance is not political, because the fact that a grievance does not generate political support "makes the individualized exercise of the right to peti-

tion all the more important." *Id.* at 1343. It also matters not if the grievance is motivated by financial self-interest. In such instances, the right to petition may be most important, and the government's effective operation may depend from time to time on such information. Since a valid complaint, by its very nature, almost always tends to injure the official complained of, this should not affect the propriety of the use of this First Amendment right. CSC's letter is not scurrilous, anonymous, or full of unfounded charges. CSC had to continually coordinate its efforts with DCA in performing its government contract. The letter dealt with a problem CSC had in coordinating its efforts with Bradley, explained the specific problem, and ended with suggestions for improving its coordination with the responsible government officials. To hold that the qualified privilege does not apply for any of these reasons would dissuade government contractors, not to mention citizens in general, who are aware of real or imaginary shortcomings of government employees from communicating their concerns to the proper authorities who can evaluate such complaints and take appropriate action if the complaints are justified. There is no doubt that the prospect of a lawsuit resulting from a complaint to a superior about federal employees would chill the exercise of the right to petition. We only add that the district court's finding that the qualified privilege was not abused is free from error.

[7] The conspiracy charge was aptly described by the district court at one place in the proceeding as a conspiracy among the defendants to do the other acts charged to them. The plaintiff takes that position and also the position that he charged a conspiracy under 42 U.S.C. § 1985(1). The district court directed a verdict for the defendants on that cause of action for lack of evidence,

whether it might be considered as a common law tort or as a violation of 42 U.S.C. § 1985(1). We think this ruling was correct.

In this connection, the plaintiff argues that the qualified immunity standard of *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), should apply instead of the more nearly absolute privilege of *Barr* and *Spalding,* and this despite the specific holding in *Butz,* note 22, p. 495, 98 S.Ct. note 22, p. 2905, confining that case to "constitutional issues." The plaintiff argues that the *Butz* standard applies where a charge of a violation of federal statute, here 42 U.S.C. § 1985(1), is claimed. Because there is no evidence of any violation of that statute, we need not decide whether or not the *Butz* standard of immunity is applicable to this case.

The judgment of the district court is accordingly.

AFFIRMED.

**EXHIBIT B**
**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

October 18, 1978

Before

Hon. Albert V. Bryan, Jr., Judge

| | | |
|---|---|---|
| JOHN H. BRADLEY, | ) | |
| *Plaintiff,* | ) | |
| v. | ) | Civil Action |
| COMPUTER SCIENCES, et al., | ) | No. 78-131-A |
| *Defendants.* | ) | |

## MEMORANDUM OPINION AND ORDER
No. 78-13A

This action alleges various claims for relief arising out of the plaintiff's former employment with the Defense Communication Agency (DCA), an agency of the United States.

The complaint alleges (1) harassment, defamation and intentional infliction of emotional distress on the part of the defendants Marden S. Champaign and Irving Bialick employees of DCA, resulting in, among other things, the removal of the plaintiff from a testing program in which he participated as an employee of DCA, and a letter of May 4, 1977 notifying the plaintiff of unsatisfactory performance (First Cause of Action); (2) libel (in the form of a letter of March 3, 1976) on the part of the defendant Computer Sciences Corporation (CSC), a company which had been requested by DCA to produce for it certain computer software, and two of its employees, defendant Herbert C. Hollander and the defendant James S. Kepler (Second Cause of Action); (3) libel, in the form of an Official Reprimand, dated July 13, 1976 which was based on the letter referred to in the Second Cause of Action, and in the form of republication of that letter, on the part of

Bialick and Champaign (Third Cause of Action); (4) libel on the part of CSC, Kepler and Hollander for the allegedly foreseeable actions taken by Bialick and Champaign as set forth in the Third Count (Fourth Cause of Action); (5) a conspiracy among all the defendants to injure the plaintiff (Fifth Cause of Action); (6) a claim against the defendants Kepler and Hollander individually rather than in their capacity as employees of CSC, for the wrongs asserted in the Second, Fourth and Fifth Counts (Sixth Cause of Action); and (7) a claim against the defendants Bialick and Champaign individually, rather than in their capacity as employees of DCA (Seventh Cause of Action).

The action was filed on March 1, 1978. Jurisdiction was asserted on the basis of diversity of citizenship and the requisite amount in controversy, 28 U.S.C. § 1332(a); on 28 U.S.C. § 1343 since a claim for a 42 U.S.C. § 1985 conspiracy is alleged; and 28 U.S.C. § 1331(a) federal question jurisdiction.

After responsive pleadings had been filed, the Court on March 31, 1978 entered an order fixing June 15, 1978 as the date for a pretrial conference and cutting off discovery on June 9, 1978. However, it was brought to the attention of the Court that the plaintiff was contesting administratively before the Civil Service Commission certain aspects of his employment treatment. Accordingly, on July 11, 1978 the Court entered an order embodying a ruling of June 9, 1978, postponing the pretrial conference until August 17, 1978, ". . . in order to preclude the possibility of inconsistent resolution of certain issues presented both here and before the Civil Service Commission."

On August 17, 1978, the case was given a trial date of September 28, 1978, which because of illness of counsel was continued until October 30, 1978, when it is now scheduled for trial with a jury.

The Civil Service Commission rendered its decision on August 9, 1978.

Over objection of plaintiff, the Court by Order entered October 11, 1978, embodying a September 22, 1978 ruling, allowed the defendants Champaign and Bialick to amend their answer so as to include the defense that the plaintiff is collaterally estopped to relitigate any matters litigated before the Civil Service Commission which were decided adversely to the plaintiff.[1] That order postponed until trial any ruling on the admissibility of any evidence which would be precluded by the defense of collateral estoppel. However, the Court has since, on October 6, 1978, directed the defendants (the defendants CSC, Kepler and Hollander have now joined Bialick and Champaign in objecting to the admissibility of evidence as to the matters litigated before the Civil Service Commission) to specify, prior to trial, just what issues it contends are precluded from relitigation or from having evidence as to them introduced. This was directed to be done so that the parties would not bring witnesses to trial who would be unable to testify. It has now been done, and the Court has considered the defendants' contentions in light of the issues raised by the complaint and the issues decided by the Civil Service Commission.

The Civil Service Commission made an exhaustive analysis of the agency specifications against the plaintiff of inefficiency in performing his assigned duties, resisting competent authority and making false and misleading

[1]The Court ruled that the defense of collateral estoppel was available to the defendants even though the previous proceeding was administrative rather than judicial in nature and even though there was the possibility that the decision of the Civil Service Commission could be reversed on appeal. As of October 13, 1978 the Court was advised that no appeal had been taken from the decision of the Civil Service Commission.

statements. With the exception of one specification of resisting competent authority and the two specifications of false and misleading statements, all of the specifications were sustained. The ultimate finding was that the ". . . removal was for such cause as would promote the efficiency of the service." Furthermore, the plaintiff's defenses, including one that asserted his removal was an action of reprisal, which he asserted and had the opportunity to raise on appeal, were found to be insufficient.

From the foregoing the Court concludes that no evidence as to the propriety of, or fact of, or circumstances giving rise to, plaintiff's removal, shall be admitted in evidence at trial either as an item of plaintiff's alleged damages or as substantive evidence in support of the various causes of actions set forth in the complaint.

Moreover, the Letter of Reprimand was obviously within the outer perimeters of the line of duty of Bialick and Champaign, and the wrongs complained of with regard to the Letter of Reprimand are common law torts – not constitutional violations. Consequently the immunity doctrine of *Barr v. Mateo*, 360 U.S. 564 (1959), is applicable, *Granger v. Marek*, No. 76-1582, August 30, 1978 (8th Cir.). Since the Third Cause of Action is based on the damage allegedly inflicted by the Letter of Reprimand, issued by Bialick and Champaign, that cause of action will be dismissed.[2]

---

[2]The Honorable Oren R. Lewis has previously denied a motion to dismiss the *entire action* under the authority of *Barr v. Mateo, supra.* This Court does not understand that he had before him any consideration of that doctrine as applied only to the Third Cause of Action. Moreover the case of *Granger v. Marek, supra,* had not been decided at the time he had the motion to dismiss under consideration.

The plaintiff has requested that, in the event of an adverse ruling on the admissibility of evidence, the matter be certified pursuant to 28 U.S.C. § 1292(b) for an interlocutory appeal. That request will be denied.

It is so ordered.

United States District Judge

Alexandria, Virginia
October 18th, 1978

## EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

| | | |
|---|---|---|
| JOHN H. BRADLEY, | ) | |
| *Plaintiff,* | ) | |
| v. | ) | **Civil Action** |
| | ) | **No. 78-131-A** |
| COMPUTER SCIENCES, CORPORATION et al., | ) | |
| | ) | |
| *Defendants.* | ) | |

### ORDER

For the reasons stated from the bench, it is hereby.

ORDERED that the motions for a directed verdict made on behalf of all the defendants at the close of the plaintiff's case are granted; the case dismissed; and judgment entered in favor of the defendants.

The request for an award of attorney's fees made by the defendants James S. Kepler, Herbert C. Hollander, and Computer Sciences Corporation is denied.

/s/ Hon. Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 31st, 1978

## EXHIBIT D

## UNITED STATES OF AMERICA

## MERIT SYSTEMS PROTECTION BOARD

| | | |
|---|---|---|
| JOHN H. BRADLEY | ) | |
| v. | ) | MSPB Docket |
| | ) | No. DC752B80323 |
| DEFENSE COMMUNICATIONS AGENCY | ) | |

Decided October 12, 1980

### OPINION AND ORDER

On August 9, 1978, the Washington, D.C. Field Office, Federal Employees Appeals Authority (now the Washington, D.C. Field Office of the Merit Systems Protection Board), issued an appellate decision which affirmed the action of the Defense Communications Agency in removing the above-named appellant from employment, effective July 1, 1977. The decision notified appellant of the regulatory provisions for requesting reopening and reconsideration thereof and stated that any request should be submitted within a reasonable time after receipt of the decision.

On November 29, 1979, appellant filed a petition requesting reopening and reconsideration of the Field Office decision, and was afforded an opportunity to provide reasons for the delay in submitting his petition. Having considered appellant's explanation, the Board finds that the reasons offered fail to demonstrate the exercise of due diligence or show sufficient explanation for the delay in

pursuing the reopening request. Although the request was based on the submission of alleged new and material evidence that was not available at the time the Field Office decision was issued, appellant has offered no explanation for the lapse of approximately five months between the time the evidence came to his personal attention and the date on which his petition was filed. Accordingly, the Board declines to accept appellant's request for reopening of the August 9, 1978 Field Office decision, because it was not timely filed.

Notwithstanding the foregoing, the Board has decided to reopen this case on its own motion pursuant to 5 C.F.R. 772.312 (1978). The record shows that appellant was removed on charges of inefficiency in performing his assigned duties, resisting competent authority, and making false and misleading statements. The third charge was based on two specifications: One involving a memorandum which appellant sent to his immediate supervisor, with copies to three other supervisors in the chain of command; the other involving a letter which appellant wrote to the Director of his agency. Both communications were critical of the agency's handling of reliability problems associated with its development of a defense computer network. The Field Office dismissed this charge and specifications, on the ground that the communications were constitutionally protected by the First Amendment, but did not articulate a rationale or cite any legal authorities to support its conclusion. The Field Office nevertheless affirmed the removal action on the ground that the evidence supported the remaining charges.

Since the issuance of the Field Office decision, the Supreme Court decided *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), which appears to support the Field Office conclusion that the com-

munications cited in the third charge were constitutionally protected. The Court also noted that under its holding in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), the employer was entitled to defend the dismissal on the ground that it would have discharged the employee even in the absence of the protected conduct.

Since the charges, on their face, show a "mixed motivation" for appellant's removal, one of which involved constitutionally protected conduct, it is clear that the Field Office should have developed the record and analyzed the evidence in light of *Mt. Healthy,* and other relevant case law. Moreover, when viewed in light of appellant's proffered new evidence, the Board finds merit in the contention asserted in his reopening request that he was unduly restricted at the hearing in the development of the evidence supporting his claim of reprisal.

Accordingly, so that these significant issues may be considered, the Field Office decision is VACATED and the case is assigned to Administrative Law Judge John J. McCarthy, for further hearing and a new adjudication.

For the Board:
October 17, 1980
Washington, D.C.

(signed)

Ruth T. Prokop
Chairwoman

## EXHIBIT E

**First Amendment, United States Constitution**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

---

**Fifth Amendment, United States Constitution**

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

---

**United States Code, Title 5, Section 4304(b)**

"An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory.

---

**United States Code, Title 42 § 1985.** Conspiracy to interfere with civil rights.

(1) Preventing officer from performing duties.

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; . . .or to injure him in his person or property on account of his lawful discharge of the duties of his office or while engaged in the lawful discharge

thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

(3) Depriving persons of rights or privileges

* * *

. . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

# Opposition

1

FILED
SEP 9 1981
ALEXANDER L. STEVAS
CLERK

No. 81-266

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JOHN H. BRADLEY, *Petitioner,*

v.

COMPUTER SCIENCES CORPORATION, INC., *et al.*, *Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

## QUESTIONS PRESENTED

1. Do any of the considerations set forth in Rule 17 of this Court weigh in favor of the Court's granting a review on the Writ of Certiorari in the case at Bar?

2. Was it error for the District of Columbia to apply the doctrine of collateral estoppel so asto preclude the petitioner from relitigating the reasons for the termination of petitioner's Federal Employment?

3. Did the appellate court err in determining that the respondents could not be held liable because of their privilege and immunity?

4. Did the appellate court err in affirming the directed verdicts for the respondents on the theories of conspiracy and intentional infliction of emotional distress?

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## OPINIONS BELOW

Two decisions have been made in this matter. The United States District Court for the Eastern District of Virginia handed down a memorandum opinion and order dated October 18, 1978. The United States Court of Appeals for the Fourth Circuit issued its opinion on March 13, 1981, published at 643 F.2d 1029.

## JURISDICTION

The petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1254.

## STATEMENT OF THE CASE

The petitioner, John Bradley (Bradley), was at all pertinent times a GS-14 civil service employee serving as an engineer within the Defense Communications Agency (DCA), where he served under the supervision of two other civil service employees, the respondents, Marsden Champaign and Irving Bialick. The corporate respondent, Computer Sciences Corporation (CSC), and its two employees, James Kepler and Herbert Hollander, dealt with, and in regard to, Bradley because CSC had government contracts to perform for, and in coordination with, DCA and DCA's civil service employees.

Bradley alleged in the District Court a pattern of conduct, acts and omissions on the parts of Champaign and Bialick, including assignments to tasks

for which Bradley alleged he was not qualified or for which he was over-qualified; failure to afford Bradley travel opportunities; promotion of others to jobs Bradley wanted, and denial of civilian contractor's "support" in specialized engineering areas and projects. The facts alleging various theories of liability against Champaign and Bialick placed those two civil service respondents within the scope of their official duties in what they did, or failure to do, in regard to Bradley.

Around December, 1973, or "approximately six months later," the petitioner filed a grievance against certain supervisors of his in DCA, and that grievance resulted in a hearing examiner rejecting the petitioner's claim that he was being abused and harassed (TR. page 58, 10/30/78), but

also produced a finding by the Hearing Examiner that a letter of reprimand should be withdrawn from the petitioner's file.

The evidence established that Bradley had had difficulties with previous government supervisors named Claremont and Giammo, who were not parties to this litigation, before Bradley was assigned into a position where his supervisors were the governmental defendants, Marsden Champaign and Irving Bialick.

The petitioner was reassigned within DCA to a division headed by Marsden Champaign around September, 1974, causing the petitioner to be "very apprehensive about coming under Mr. Champaign" (TR., page 62, 10/30/78), but the petitioner hoped that the assignment to serve under Champaign's supervision

would only last the 120 days reflected in a document contemporaneous with that assignment.

The respondents CSC, Kepler and Hollander allegedly defamed Bradley by a letter dated March 3, 1976, which expressed CSC's complaints about what Bradley had done with rough draft notes given to Bradley by a CSC employee, and that letter also expressed complaints to DCA about proc dural problems Bradley caused CSC and CSC's performance of its contract with DCA.

Bradley also alleged that all respondents conspired to, and did, intentionally inflict emotional distress on Bradley.

In a pretrial ruling, by a written Order dated October 18, 1978, the District Court judge estopped relitigation of Bradley's dismissal for cause, which had

occurred after a full agency hearing. The Trial Court's Order of October 18, 1978, explicitly explained why the plaintiff would be estopped from re-litigating matters already adjudicated in the Administrative Civil Service hearing, and extended that estoppel's effect on the admission of trial evidence to include all defendants.

At trial Bradley was allowed to, and did, present damage evidence tending to establish that the acts of the respondents had caused him psychiatric problems and curtailed his ability to function, both in his potential employment and in regard to his personal life.

At the close of Bradley's case, the District Court granted a motion for a directed verdict on behalf of all defendants.

On Bradley's appeal to the United

States Court of Appeals for the Fourth Circuit, the Court affirmed the decision of the District Court.

## ARGUMENT

1. None of the considerations set forth in Rule 17 of this Court weigh in favor of the Court's granting a review on the Writ of Certiorari in the case at bar.

The granting of certiorari should occur only when special and important reasons exist therefor. Such a grant is not a matter of right, but of sound judicial discretion. Fay v. Noia, 372 U.S. 391 (1963). Rule 17 of the United States Supreme Court indicates certain instances in which certiorari may be properly granted. The petition in the case sub judice meets none of these criteria.

The Court's power of supervision will be exercised when a conflict exists between the courts of appeals decisions. No such conflict has been demonstrated in the instant case. Jurisdiction further should be assumed by the Court when an important or novel question of federal

law is presented. The petitioner presents no question of federal law which needs to be settled by this Court.

As was stated by the Court in Rice v. Sioux City Memorial Parks Cemtary, 349 U.S. 70 (1955), certiorari should not be granted except in cases involving principles important to the public interest, as distinguished from the interest of individual parties, and in cases where a true divergence in opinion exists between federal courts of appeals. Therefore, the Supreme Court should deny the petition in the case at bar.

2. The District Court correctly applied the doctrine of collateral estoppel to preclude the petitioner from relitigating the reasons for termination of his employment.

Petitioner asserts that the lower courts have used estoppel "as a legal technicality to avert justice rather than to aid judicial efficiency." (Petition

for Writ at 9). It has long been held that, on the contrary, collateral estoppel is a means of promoting judicial economy by preventing needless litigation. See, e.g., Parklane Hosiery Co. v. Shore, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). While the Fourth Circuit determined that it was not even necessary to reach the collateral estoppel issue, 643 F.2d 1029, Fn.2 (1981), the Petitioner relies on the issue in asserting his right to certiorari. As such, the respondents here address the issue.

The District Court properly applied the doctrine of collateral estoppel because the identical issue of why Bradley's employment had been terminated had been adjudicated after a full hearing. It should be noted that the petitioner had voluntarily dismissed a pending District Court suit for damages claimed

here against the same respondents in November, 1978, on the eve of a scheduled jury trial. He thereafter participated in the administrative hearing which culminated in a final ruling before his second filing of this suit could be heard on the merits. Having elected not to try his case in November, 1978, he waived his opportunity to first adjudicate in the federal court the employment issue subsequently adjudicated against him administratively.

That the prior decision was made by administrative agency rather than a judicial forum is of no legal significance, as any prior judgment may be held conclusive as to those matters which are put at issue, litigated, and necessarily decided in the first action. Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); United States v. Utah Construction Co., 386 U.S. 394 (1966).

In Garner, the Fifth Circuit cited with approval its decision in Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969), in which a prior determination of the National Labor Relations Board on a liability issue was res judicata, in a subsequent damage suit, between the same parties where the NLRB had conducted a full hearing, the parties had been represented by counsel, and both parties had the opportunity to present evidence and to cross-examine witnesses.

In the case sub judice, Bradley not only litigated fully in the administrative hearing that terminated his employment, but he actually prevailed on one of the three issues asserted against him as a ground for removal.

The petitioner argues that estoppel was applied to restrain his presentation

of evidence which would have created a prima facie case of liability. A review of the record in the District Court, however, reveals that Bradley was allowed wide latitude in the presentation of evidence in his attempt to establish those issues that had not been estopped, including defamation, intentional infliction of emotional distress, and conspiracy. Therefore, no prejudice to Bradley can be demonstrated.

Bradley was properly estopped from asserting as damages in this civil suit the termination of his federal employment, because such termination had been decided for causes specified in an administrative hearing, in which Bradley was represented by counsel and in which he fully participated. For Bradley to be given another opportunity to assert the same claim would be to render the prolonged adminis-

trative adjudication a nullity, and to subject the District Court to a time-consuming and wastefully repetitious attempt by the petitioner to persuade the civil jury that his job was not terminated for the reasons already decided.

3. The appellate court committed no error in determining that the respondents could not be held liable because of their privilege and immunity.

The Fourth Circuit, in its review of the District Court judgment, correctly determined that the respondents could not be held liable, excepting the conspiracy count, because of their privilege or immunity. (As stated in footnote 2 of that opinion, the conspiracy count failed for other reasons.) While the doctrines of privilege and immunity are necessarily intertwined, the concepts will be discussed separately in order to precisely state your

respondents' contentions.

The appellate court held that the trial judge correctly applied the doctrine of qualified privilege to the CSC letter about which the petitioner complains. The relationship of CSC to Bradley's agency, DCA, and the need for CSC to continually coordinate its efforts with DCA in performing the government contract, made it logical and necessary for CSC to express complaints to Bradley's supervisors if, and when, CSC had difficulty functioning with Bradley. To hold otherwise would dissuade defense contractors, and citizens in general, from forwarding complaints of actual or perceived failings of government employees to the appropriate authorities who can evaluate such complaints and take any action necessary thereto.

The Fourth Circuit relied on the

case of Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), cert. den. 434 U.S. 975 (1977) to support its determination that "the right to petition may be most important, and the government's effective operation may depend from time to time on such information." (Slip opinion at 8.) As persuasively enunciated by the appellate court, the fact that an official may be injured by such a communication does not overcome the propriety of the exercise of the First Amendment right to petition. Public criticism of all areas of the government "is at the very core of the constitutionally protected free speech area." Stern at 1342.

The most perfunctory reading of the letter in question establishes without question that the writers did not exceed the bounds of qualified privilege.

The letter was not knowingly false, nor did it contain scandalous or unfounded allegations or statements. The letter enunciated a specific problem then and there existing, and suggested ways to alleviate the problem. To hold the writers civilly liable for such a communication would only serve to chill the exercise of their First Amendment rights.

The doctrine of Barr v. Matteo, 360 U.S. 564 (1959) was the basis for the District Court's holding that the defendants in this lawsuit were immune to the libel cause of action, and for the appellate court's subsequent affirmation of that determination. The petitioner neither pled a constitutional violation nor asserted that the governmental officials acted beyond the scope of their authority. Because every act with which

the government defendants have been charged is within the scope of their duties, the District Court was correct in applying the doctrine of immunity.

Bradley devotes pages of his petition to the law in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), alleging that the case law mandates the disqualification of the immunity doctrine to the case at bar. However, the petitioner himself undermines and renders impotent this allegation when he correctly points out that Bivens sounds in constitutional issues; as the Fourth Circuit stated, Bradley conceded that he did not plead a constitutional violation.

In Granger v. Marek, 583 F.2d 781 (6th Cir. 1978), the Court analyzed factual variations to be weighed and noted that the applicability of immunity

in each case was "dependent upon the scope of discretion and responsibilities of the office and all circumstances as they reasonably appeared at the time of the action on which liability is sought. It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that afford a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Granger, supra, at 783, 784, quoting from Scheur v. Rhodes, 416 U.S. 232, 247-248 (1974).

In this case, government engineers and private defense contractors were dealing in sophisticated computerized military command and communications systems important to the national defense. Their actions regarding Bradley were all taken within the chain of command and the organizational structure of DCA and

their interaction with CSC was related to performance of a government contract to render services for DCA. Thus, all such actions were immune.

4. The appellate Court correctly affirmed the directed verdicts for the respondents on the theories of conspiracy and intentional infliction of emotional distress.

In granting the defendants' motions for directed verdicts, the trial court found that there was no "evidence as far as either the government or the private defendant, for that matter, of any conspiracy." (TR. 10/31/78, p. 437: 15-18.) There was absolutely no evidence tending to establish that any of the respondents acted unlawfully or for an unlawful purpose individually or collectively. The evidence thus fell far short of establishing a prima facie case of any form of conspiracy.

Virginia law recognizes a civil

cause of action for damages arising from the intentional infliction of emotional distress when four elements are proven:

> One, the wrongdoer's conduct was intentional or reckless...,two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality...,three, there was a causal connection between the wrongdoer's conduct and the emotional distress..., four, the emotional distress was severe. Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974).

In the case at bar, the evidence, viewed in the light most favorable to the petitioner, would only create a jury issue as to the fourth element. Nothing done by CSC, Kepler or Hollander would seem to allow any reasonable inference that their drafting and mailing the letter of March 3, 1976, was "reckless," "outrageous," "intolerable" or such as "offends against the generally accepted standards of decency and moral-

ty." Thus, the appellate court correctly affirmed the trial court's ruling that Bradley failed to establish a prima facie case of intentional infliction of emotional distress.

## CONCLUSION

For the aforementioned reasons, your respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari filed herein.

Respectfully submitted,

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# Opposition

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No. 81-266

# In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN H. BRADLEY, PETITIONER

*v.*

COMPUTER SCIENCES CORPORATION, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether, under *Barr* v. *Matteo*, 360 U.S. 564 (1959), the federal respondents are absolutely immune from personal damages liability for libel and other common law torts based on actions within the scope of their authority.

2. Whether the district court correctly concluded that petitioner failed to prove a conspiracy among respondents to engage in conduct in violation of 42 U.S.C. 1985(a).

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# In the Supreme Court of the United States

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JOHN H. BRADLEY, PETITIONER

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---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 643 F. 2d 1029. The district court's pretrial order (Pet. App. 12a-16a) and its opinion from the bench granting the motions for a directed verdict (Tr. 436-443) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 13, 1981. The petition for a writ of certiorari, following an extension, was filed on August 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner is an engineer formerly employed with the Defense Communications Agency (DCA). The federal respondents, Irving Bialick and Marsden Champaign, are employees of DCA. The non-federal respondents are the

Computer Sciences Corporation and two of its employees, James Kepler and Herbert Hollander.

Petitioner brought the present suit alleging that the respondents had defamed and harassed him and had intentionally inflicted emotional distress upon him on various occasions while he was employed with DCA. In 1973 and 1974, respondent Champaign had written two memoranda to the Chief of the Software Operations Division of DCA criticizing presentations made by petitioner to representatives of the Joint Chiefs of Staff on a particular project and petitioner's failure to follow guidelines with regard to the nature of the presentations. Because of these failures, Champaign recommended that petitioner be removed from the project on which he was working (C.A. App. 37-41).[1] In his first cause of action, petitioner alleged that these memoranda were written for the purpose of causing him mental anguish and distress. In that same cause of action, petitioner also complained of other acts by Champaign and respondent Bialick, another DCA supervisor, including allegations that they transferred petitioner to another position, assigned him tasks for which he was overqualified, made false and derogatory entries in his personnel files, and wrongfully denied him training opportunities and promotions (C.A. App. 4-7).

The remainder of petitioner's complaint concerned a report he was assigned to prepare for the Joint Chiefs of Staff regarding security procedures for a computer communications network. Computer Sciences Corporation, which had a contract with DCA regarding the same subject matter, agreed to assist petitioner in preparing the report. Computer Sciences forwarded informal handwritten notes on the subject to petitioner (C.A. App. 22-26). Petitioner had the notes typed and submitted them with minor modifications (C.A. App. 28-31), asserting that they represented

[1] "C.A. App." refers to the appendix in the court of appeals.

the contractor's efforts. This approach was unresponsive to the request by the Joint Chiefs of Staff as to the nature of the report and was inconsistent with his supervisor's specific instructions that the report be an official response. The Joint Chiefs of Staff found the report unsatisfactory. See Pet. App. 4a-5a; C.A. App. 32-33.

On March 3, 1976, respondent Kepler, an employee of Computer Sciences, wrote a letter to petitioner's superiors at DCA complaining that petitioner had misrepresented the intent of the notes as a final product for the Joint Chiefs of Staff and that petitioner's report was therefore detrimental to the corporate image of Computer Sciences (C.A. App. 19-20). On July 13, 1976, respondent Bialick, petitioner's supervisor at DCA, issued an official reprimand to petitioner with respect to the circumstances surrounding the report he submitted to the Joint Chiefs of staff (C.A. App. 32-36).

In May 1977, DCA issued petitioner a notice of unsatisfactory performance, a denial of a within-grade salary increase, and a notice of proposed removal. The next month, petitioner received a memorandum setting forth the Agency's decision to remove him from his position in DCA, effective July 1, 1977 (Pet. App. 5a). On July 15, 1977, petitioner appealed his removal to the Civil Service Commission.[2]

2. In March 1978, while his appeal was pending before the Civil Service Commission, petitioner filed the complaint in the instant case in the United States District Court for the Eastern District of Virginia.[3] He contended that the

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[2]As a result of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, the Civil Service Commission's responsibility for reviewing removal decisions was transferred to the Merit Systems Protection Board.

[3]While petitioner appears *pro se* before this Court, he was represented by counsel at all earlier stages of this litigation.

federal respondents had tortiously harassed him, defamed him, and intentionally caused him to suffer emotional distress through the actions described above. He also contended that the non-federal respondents had libeled him by writing the March 3, 1976, letter criticizing the manner in which he submitted the report to the Joint Chiefs (Pet. App. 5a-6a; C.A. App. 4-18). Petitioner further alleged that all respondents had conspired to commit the common law torts and "to impede him in the performance of his official duties" (C.A. App. 16). The last-quoted allegation apparently was intended to assert a violation of 42 U.S.C. 1985(a).[4] See C.A. App. 4; see also Pet. App. 10a-11a. Petitioner did not allege any constitutional violation.

Respondents moved to stay proceedings in the district court pending a decision by the Civil Service Commission on petitioner's appeal of his removal. After the Commission's Field Office upheld petitioner's removal, the district court ruled that petitioner was collaterally estopped from relitigating any matter litigated and decided by the Commission (Pet. App. 14a). The district court further ruled that under *Barr* v. *Matteo*, 360 U.S. 564 (1959), the federal respondents were absolutely immune from suit on petitioner's cause of action alleging libel and other common law torts in connection with the July 13, 1976, letter of reprimand, the issuance of which the court found to be

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[4] 42 U.S.C. 1985(a) imposes civil liability on

> two or more persons in any State or Territory [who] conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties * * *.

"obviously within the outer perimeters of the line of duty of [respondents] Bialick and Champaign" (Pet. App. 15a). Following the presentation of petitioner's case at trial, the district court directed a verdict for the federal respondents on the remaining counts, concluding that because there was no allegation of a constitutional violation and the actions complained of fell within the outer perimeter of their authority, respondents were immune from suit under *Barr* v. *Matteo, supra.* Tr. 437-438.[5] Moreover, with respect to the alleged conspiracy, the court found "no evidence of any concerted action to accomplish an unlawful purpose" (*id.* at 437) and no "evidence of the type of conspiracy that [42 U.S.C. 1985(a)] talks about" (Tr. 437).

The district court also granted the motions for a directed verdict filed by the non-federal respondents, reiterating its previous finding that there was "no evidence of any concerted action on their part to accomplish any unlawful purposes" or of any intentional infliction of emotional distress (Tr. 438). With respect to the cause of action alleging libel in connection with the March 3, 1976, letter to petitioner's supervisors, the court concluded that a letter written by a member of the public to a government official complaining about the performance of one of his subordinates constitutes a "classic case" of conduct protected by a qualified privilege. Accordingly, the district court held that petitioner could recover only upon a showing of an absence of good faith, the use of language disproportionate to the occasion, or giving the letter unnecessary publicity in order to injure petitioner. Finding no such evidence that the privilege had been lost, the district court concluded that the

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[5] In the alternative, the district court found insufficient evidence of intentional infliction of emotional distress to submit the case to the jury, even assuming that the federal respondents were not immune from suit. Tr. 436-437.

letter was protected by a qualified privilege as a matter of law. Tr. 439-440.[6]

3. The court of appeals affirmed (Pet. App. 1a-11a). Noting that petitioner conceded he had not pleaded a constitutional claim and that he did not argue that the federal respondents had acted beyond the scope of their authority, the court concluded (Pet. App. 8a-9a) that the federal respondents were immune from suit under *Barr* v. *Matteo* with respect to petitioners' common law tort claims. The court of appeals also agreed with the district court's holding that the March 3, 1976, letter from Computer Sciences to petitioner's superiors at DCA was protected by a qualified privilege, and it concluded that the district court's finding that the privilege was not abused by the non-federal respondents was "free from error" (Pet. App. 10a).

Similarly, the court of appeals held that the district court had correctly directed a verdict in favor of all respondents on the conspiracy cause of action, whether the conspiracy charged was considered a common law tort or a violation of 42 U.S.C. 1985(a). Because there was no evidence of a violation of 42 U.S.C. 1985(a), the court of appeals expressly refrained from deciding whether the *Barr* v. *Matteo* absolute immunity rule for federal officials applies in an action brought under that statute, rather than a qualified immunity standard akin to that recognized in *Butz* v. *Economou*, 438 U.S. 478 (1978), for constitutional torts. Pet. App. 10a-11a.

Finally, the court of appeals did not decide whether the district court's ruling on the collateral estoppel issue was correct, because there was no indication that any evidence

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[6]The court observed that the March 3, 1976, letter from Computer Sciences was "innocuous" in any event, but assumed for purposes of ruling on the motion for a directed verdict that it could be construed as defamatory. Tr. 438-439.

excluded under the district court's order would have altered the facts upon which the court of appeals based its decision regarding the respondents' immunity from suit and the absence of evidence on the conspiracy charge (Pet. App. 6a-7a n.2).[7]

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 17-22) that the lower courts improperly concluded that the federal respondents were absolutely immune from suit for libel, defamation, harassment, and intentional infliction of emotional harm. This contention is in error.

In *Barr* v. *Matteo*, 360 U.S. 564 (1959), this Court held that, notwithstanding allegations of malice, a federal official is entitled to absolute immunity from a defamation suit so long as the actions complained of were taken within the outer perimeter of his line of duty. *Id.* at 574-575. Subsequently, in *Butz* v. *Economou*, 438 U.S. 478 (1978), this

[7]On October 12, 1980, while this case was under submission in the court of appeals, the Merit Systems Protection Board remanded petitioner's administrative appeal in the proceedings challenging his removal from DCA (Pet. App. 18a-20a). The Board observed that one of the bases for DCA's removal of petitioner was that he had written a memorandum to his immediate supervisor and a letter to the Director of DCA that were critical of the Agency's work. The Commission's Field Office had not sustained this ground for removal, finding that the communications were protected by the First Amendment. See *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). The Board concluded, however, that because the motiviations for DCA's removal decision were mixed, the Field Office should determine on remand whether DCA would have discharged petitioner in the absence of the protected communications. The Board also concluded that petitioner had been unduly restricted at the first hearing in the development of evidence supporting his claim of reprisal. We have been informed that the removal action is still pending on remand following a reopened administrative hearing.

Court held that federal officials, with certain exceptions, are not absolutely immune from suits alleging violations of *constitutional* rights but are, instead, entitled only to a qualified immunity. In doing so, however, the Court specifically observed that this holding was limited to suits alleging constitutional violations. *Id.* at 495 & n.22; see also *Ferri* v. *Ackerman*, 444 U.S. 193, 202-204 (1979). Since *Butz* was decided, the courts of appeals uniformly have held that *Butz* did not alter the *Barr* v. *Matteo* rule of absolute immunity of federal officials from common law tort actions. See, *e.g.*, *George* v. *Kay*, 632 F. 2d 1103, 1106 (4th Cir. 1980), cert. denied, No. 80-991 (Mar. 30, 1981); *Bush* v. *Lucas*, 598 F. 2d 958, 960 (5th Cir. 1979), vacated and remanded on other grounds, 446 U.S. 914 (1980), on remand, 647 F. 2d 573, 575 (1981), petition for cert. pending on other grounds, No. 81-469; *Evans* v. *Wright*, 582 F. 2d 20, 21 (5th Cir. 1978); *Granger* v. *Marek*, 583 F. 2d 781, 784 (6th Cir. 1978); *Mir* v. *Fosburg*, 646 F. 2d 342, 346 (9th Cir. 1980); *Miller* v. *DeLaune*, 602 F. 2d 198, 200 (9th Cir. 1979); *Sami* v. *United States*, 617 F. 2d 755, 770-771 (D.C. Cir. 1979). See also *Birnbaum* v. *United States*, 588 F. 2d 319, 322 (2d Cir. 1978); *Bishop* v. *Tice*, 622 F. 2d 349, 359 (8th Cir. 1980); *Tigue* v. *Swaim*, 585 F. 2d 909, 913 (8th Cir. 1978).

In the instant case, petitioner alleged that the federal respondents tortiously defamed, libeled, harassed, and intentionally inflicted emotional distress upon him by criticizing his work and by denying him various requests made with regard to his work. These are all non-constitutional torts[8] to which the rule of *Barr* v. *Matteo* applies. Accordingly, because the actions complained of—the assignment

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[8]Both the district court and the court of appeals concluded that petitioner had not alleged a violation of a constitutional right in this case (Pet. App. 8a-11a, 15a). Indeed, the court of appeals noted (*id.* at 8a) that petitioner had conceded that he did not plead a constitutional

of job responsibilities, the investigation of allegations of misconduct, and the issuance of reprimands for unacceptable conduct—were within the scope of the federal respondents' authority, the courts below correctly held that they were absolutely immune from suit.[9]

2. Petitioner also argues (Pet. 9-17) that the district court improperly applied the doctrine of collateral estoppel to foreclose relitigation of any issue litigated and determined in the administrative proceedings pertaining to his removal from DCA. "Th[is] ruling took the form of excluding from evidence the propriety of, or fact of, or circumstances giving rise to [petitioner's] removal * * *" (Pet. App. 6a n.2).

However, the court of appeals found it unnecessary to decide whether the district court had properly determined that the doctrine of collateral estoppel was applicable, because it concluded that affirmance of the judgment of the district court was required irrespective of the correctness of that ruling. The court of appeals observed that the administrative proceedings—including the Merit Systems Protection Board's remand order in those proceedings—"[did] not deal in any way with matters respecting the privilege or immunity of the defendants" (Pet. App. 7a n.2). The court

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violation. Petitioner's conclusory assertions (Pet. 19, 22) that a constitutional violation was implicit in his complaint brought under 42 U.S.C. 1985, and that the alleged harassment constituted a deprivation of his property in violation of the Fifth Amendment, plainly are insufficient to inject constitutional claims into the case after trial and appeal.

[9]Petitioner contends (Pet. 19) that the decision below is in conflict with *Mark* v. *Groff*, 521 F. 2d 1376 (9th Cir. 1975). No such conflict exists. *Mark* held that federal officials enjoy only a qualified immunity from damages liability for violations of an individual's *constitutional* rights. Indeed, the Ninth Circuit, in agreement with the decision here, has indicated that for alleged non-constitutional torts, federal officials are entitled to absolute immunity under *Barr* v. *Matteo*. See *Mir* v. *Fosburg*, *supra*, 646 F. 2d at 346; *Miller* v. *DeLaune*, *supra*, 602 F. 2d at 200.

of appeals noted that it had not "had called to [its] attention how any evidence excluded by the [collateral estoppel] order of the district court would have altered in any significant way the facts upon which the decision for the defendants was based" (*ibid.*). Because the court of appeals did not reach the collateral estoppel issue and correctly concluded that the issue has no bearing on the proper disposition of this case, there is no occasion for this Court to consider petitioner's challenge to the district court's collateral estoppel ruling.[10]

3. Petitioner asserts (Pet. 22) that the courts below erred in finding the federal respondents absolutely immune from suit on his cause of action alleging a statutory violation under 42 U.S.C. 1985(a). But the court of appeals did not hold that the federal respondents were absolutely immune

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[10]In any event, the district court's order was correct to the extent that it precluded petitioner from contesting in court the validity of his removal from the DCA. This Court has made clear that collateral estoppel effect may be given to the decisions of administrative bodies in appropriate circumstances (see, *e.g.*, *United States* v. *Utah Construction Co.*, 384 U.S. 394, 422 (1966)), and no reason appears why this rule should not apply to decisions of the Merit Systems Protection Board reached after an opportunity for a full and fair hearing. Cf. *Purtill* v. *Harris*, No. 81-1187 (3d Cir. Aug. 24, 1981); *Bush* v. *Lucas*, *supra*; *Bishop* v. *Tice*, *supra*, 622 F. 2d at 357 (holding that the availability of extensive and carefully crafted statutory and regulatory procedures for consideration of a civil service employee's claims indicates that a cause of action should not be implied under the Constitution). Compare *Sonntag* v. *Dooley*, 650 F. 2d 904 (7th Cir. 1981) (implying a constitutional remedy where civil service regulations are found to afford no hearing or other protection to an employee); compare also *Bishop* v. *Tice*, *supra*, 622 F. 2d at 357.

under that section; it expressly declined to reach that question (Pet. App. 11a).[11] Rather, the court of appeals affirmed on the basis of the district court's holding that petitioner had not adduced any evidence of concerted activity of the type to which 42 U.S.C. 1985(a) is directed (Pet. App. 10a-11a). This fact-bound conclusion does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

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[11] Although the district court's ruling from the bench on the motion for a directed verdict is somewhat ambiguous, that court does appear to have concluded that the federal respondents were immune from suit under the holding in *Barr* v. *Matteo* with respect to the claim arising under 42 U.S.C. 1985(a) (Tr. 437-438). We, too, have reservations about an interpretation of 42 U.S.C. 1985(a) and the scope of immunities available under that section which would enable a federal employee to avoid the rule of *Barr* v. *Matteo* merely by pleading his common law tort claims arising out of grievances against his superiors as a conspiracy to impede the performance of his official duties.

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# Petitioner's Reply Brief

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No. 81-266

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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JOHN H. BRADLEY, *Petitioner,*

v.

COMPUTER SCIENCES CORPORATION, INC., *et al.*,
*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## PETITIONERS REPLY BRIEF

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Date: September 29, 1981

## QUESTION PRESENTED

1. Do any of the considerations set forth in Rule 17 of this Court weigh in favor of granting a review on the Writ of Certiorari in the case at bar ?

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### RULES


Rules of the Supreme Court of the
United States, Rule 17..... 3,8

## OPINIONS BELOW

Four decisions have been made in this matter, each of which have been cited and set forth in replica in the Petition For Writ of Certiorari filed on August 10, 1981 with this Court at Appendix, Exhibits A, B, C and D.

The opinion of the U. S. Court of Appeals for the Fourth Circuit is a published opinion, cited as 643 F.2d 1029 (1981).

## JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C.1254 for review by certiorari of the judgment of the United States Court of Appeals for the Fourth Circuit.

## STATEMENT OF THE CASE

The factual background of the case sub judice was presented in the Petition for Writ of Certiorari filed on August 10, 1981. In that initial brief, petitioner described a series of judicial decisions which had been based predominantly on legal technicalities. The cumulative impact was devastating: petitioner was denied a hearing on the merits of his case at each level.* Now, respondent raises a question of petitioner's right to consideration under a procedural rule of this Court: Rule 17. This Reply brief offers a defense.

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* NOTE: At the administrative tribunal level, petitioner's defense against his removal was restricted to exclude "mitigating factors". At the District Court level, all evidence relating to the removal and factors leading up to it were ruled to be "collaterally estopped". At the appellate level, the Fourth Circuit declined to review the fatal collateral estoppel impact, finding an immunity for both Federal and corporate defendants in the restricted evidence.

## ARGUMENT

I. The criteria set forth by the Court in Rule 17 weigh heavily in favor of granting a review on the Writ of Certiorari.

A. The Court's power of supervision.

In setting forth its criteria governing review on certiorari, the Court provides both general guidance and specific guidance. As a general rule, the Court advises that review will be granted "only where there are special and important reasons therefor." Furthermore, the Court emphasizes that its specific guidance is "neither controlling nor fully measuring the Court's discretion."

It is in this context of the Court's broad discretion and the unique circumstances of the case at bar that

petitioner argues for acceptance of his petition for review.

The unique circumstances of the case at bar concern an issue of national security for which there may be no precedent outside of fiction. Two Federal supervisors, working together on a world-wide computer network whose primary mission is to support the President during a nuclear attack on the United States, conspire to discredit a senior test engineer on the project, and ultimately to remove him from his job. During the process of the conspiracy, the supervisors elect to place the priority of a personal vendetta against the engineer above the priority of the national defense. The public welfare is broadly at stake.

Respondent cites Fay v. Noia, 372 U.S. 391 (1963) for the principle that a grant of review is not a matter of right, but of sound judicial discretion. Petitioner does not argue with the Rule's principle, but asserts that Fay is far removed from the case at bar, dealing as it does with a case of "federal habeas corpus jurisdiction, 28 U.S.C. 2241 et seq. in its relation to state criminal justice."

Opposing counsel recognized in his respondent brief that the jurisdiction of the present case was invoked under 28 U.S.C. 1254. Petitioner holds therefore that the distant jurisdictional kinship of Fay does not support respondent's argument to apply the Rule 17 principle against granting certiorari.

In citing Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70 (1955), respondent draws on case precedent which supports petitioner's case rather than his own. Rice deals with 14th Amendment violations alleged in a contract which provided that "burial privileges accrue only to members of the Caucausian race." Respondent cites Rice in his contention that "certiorari should not be granted except in cases involving principles important to the public interest, as distinguished from the interest of individual parties..."

As noted above, the public interest is so decisively at stake in the President's crisis computer network that petitioner's individual interests are dwarfed by comparison. Indeed, the comparison is so extreme as to render

ludicrous any attempt by respondent to shield the defendants beneath the cloak of immunity as in the case at bar. The defendants' attempt to subordinate the national defense priority to the priority of the personal vendetta against petitioner has been revealed in objective detail by an independent agency of the Federal Government acting at the request of the Congress, - the General Accounting Office. There can no longer be any denial of the part played by defendants in their reckless disregard of the higher national priority.

It follows from the above, that the Court's concern for matters of the public interest weigh heavily under Rule 17 for granting a review on the Writ of Certiorari in the case at bar.

b. The Conflict between Appellate Courts.

Leaving the matter of general guidance by the Court in Rule 17, petitioner turns now to the relevant portion of its specific guidance:

> Rule 17.1(a) - "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;...", the Court will consider in its discretion, a review on writ of certiorari.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Court remanded the case to the Second Circuit. The appellate court then held that an offense would be privileged IF the officer acted "in good faith and with a reasonable belief in the validity ..." of his action. (Emphasis added)

The Fourth Circuit ruling in the case at bar, however, shielded the corporate defendants as well as peti-

tioner's immediate supervisor in the cloak of immunity. Petitioner asserts that this ruling begs to be reviewed by the Court, not only because of the conflict between rulings of appellate courts, but particularly because of the unique circumstances sub judice: both the corporate defendants and the defendant Federal supervisor were joined in an illegal association at all material times by stockholdings forbidden by Federal law and agency regulation. "Good faith" and "a reasonable belief" were at once impossible by the Federal supervisor acting out of loyalty to, and under the influence of the corporate contractor in such an illicit environment.

The exercise of the Court's supervisory role is urgently needed.

In another example, the Fourth Circuit has ruled that petitioner's case fails because he cites no constitutional violation.[1] The Ninth Circuit, however, saw the issue differently; Mark v. Groff, 521 F.2d 1376 (1975):

> "Accordingly we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights IS IDENTICAL to the immunity doctrine applied in Section 1983 suits." (Emphasis added.)

Petitioner asserts that the case sub judice is again shown to deserve the supervision of this Court by authority of Rule 17.1 (a) as it applies to disagreements between appellate courts.

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NOTE 1. The lower court collaterally estopped all evidence that the administrative tribunal had found petitioner's First Amendment rights violated. On appeal, the Fourth Circuit declined to review the estoppel point, leaving petitioner's case crippled, with a Constitutional issue by inference only. The appellate court then found the Federal defendants immune, and called on First Amendments rights to give the corporate defendants qualified immunity.

The circumstances in the case at bar provide even further justification for this Court to assume its supervisory role. The Ninth Circuit again gives the point of disagreement between the federal appellate courts; Mark, supra, at 1379, Note 4:

> "If the officer's actions were not in the course of official conduct, he is not entitled to any qualified immunity or good faith defense."

Prior to his employment by the Federal Government in 1974, petitioner's supervisor had been employed by the corporate defendant, Computer Sciences Corporation. The time period of the previously-noted illicit stockholder relationship was from 1974 until after the supervisor had finally accumulated removal charges against petitioner in May, 1977. This stockholder identity

was useful to the corporation because the supervisor was responsible for overseeing the contractor's work performance, as well as its annual contract renewal. The President's crisis computer network was the common federal work environment in which petitioner, his supervisor, and the corporate defendants were joined.

The question confronting the lower courts by these unusual circumstances was whether a federal supervisor, concurrently holding a dual identity as a corporate stockholder, was entitled to any immunity in a case involving allegations of conspiracy between the two under Sect. 1985(1).[2]

NOTE 2. "It is a tautology that a federal official cannot have discretion to behave unconstitutionally, or outside the scope of his delegated authority." Avery v. U. S., 434 F.Supp. 937, (1977), at 944.

If the answer was no, then the Ninth Circuit in Mark, supra, and Fourth Circuit herein, were at opposite ends of the immunity question. Petitioner submits that the answer is no, according to Avery, (Note 2), and calls upon this Court to invoke Rule 17.1 (a) and its power of supervision for review on writ of certiorari.

In raising the generalized question of Rule 17, respondent opens a Pandora's box for petitioner to seek out each of a multitude of examples which would justify consideration by the Court for granting a review. Petitioner submits that the aforementioned examples suffice, and that there may be a simple summation.

It is suggested that the problem in the present case is to arrive

at a balance between two sets of interests, for respondent and petitioner, both dealing with the First Amendment rights of the parties involved:

1. For petitioner, - the right of the Federal employee/citizen in speaking out to the National Security Council about what he perceived to be a major engineering vulnerability in a vital defense computer network, without the threat of losing his job;

2. For respondent corporate executives, - the right to complain about a Federal employee in matters affecting their work performance and performance evaluation in the defense computer network project; and

3. For respondent Federal supervisors, - the right to direct the Federal employee to work with respondent

corporation, and then to speak out in defense of the private contractor, and to initiate disciplinary actions against the Federal employee in support of the contractor's complaint.

In the case sub judice, the Fourth Circuit was blind to petitioner's First Amendment rights related to an urgent matter of the national defense, envisioning instead a superior First Amendment right of the contractor to complain about petitioner as a Federal employee. This Court has ruled under Pickering[3] and its progeny that, unless the employee's comments are actually disruptive, single out a specitic person

NOTE 3. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct.1731, 20 L.Ed.2d 811 (1968).

as target, or materially interfere with the performance of an employee's duties, the right to unhampered expression on matters of public salience will prevail.

The record shows that petitioner's attempt to bring the engineering vulnerability matter to competent authority was at no time during his Federal employment involved with the media. Starting quietly, in writing to his immediate supervisor, petitioner ultimately went through all levels within his agency and was repeatedly faced with inaction and disdain. Only when petitioner had been frustrated in all intra-agency channels did he go outside the bureaucracy to speak to Congress and the National Security

Council. Petitioner had unwittingly complied with the Pickering rule in the exercise of his First Amendment rights, but to no avail. Retribution came quickly, and in direct response to petitioner's warning alert conversations with other entities within the Federal Government.

Petitioner submits that the Fourth Circuit "has so departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision", in accord with the provisions of Rule 17.

## CONCLUSION

For the reasons set forth herein, petitioner respectfully urges this honorable Court to grant the Petition For Writ Of Certiorari heretofore filed in this matter.

Respectfully submitted,

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